

**WAR POWERS AND THE EFFECTS OF  
UNAUTHORIZED MILITARY ENGAGEMENTS ON  
FEDERAL SPENDING**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON FEDERAL SPENDING  
OVERSIGHT AND EMERGENCY MANAGEMENT  
OF THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
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# WAR POWERS AND THE EFFECTS OF UNAUTHORIZED MILITARY ENGAGEMENTS ON FEDERAL SPENDING

WEDNESDAY, JUNE 6, 2018

U.S. SENATE,  
SUBCOMMITTEE ON FEDERAL SPENDING,  
OVERSIGHT AND EMERGENCY MANAGEMENT,  
OF THE COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Rand Paul, Chairman of the Subcommittee, presiding.

Present: Senators Paul, Peters, and Harris.

Also present: Senators Lee, Sanders, Merkley, McCaskill, and Udall.

## OPENING STATEMENT OF SENATOR PAUL<sup>1</sup>

Senator PAUL. I bring to order the Subcommittee hearing. I want to thank everybody for attending. I think this is a very important hearing.

My father used to always say there were two things you rarely heard in Washington, and that was either a moral argument or a constitutional argument. Today we are going to discuss the Constitution, how we go to war, and what is the Constitution's approach to war.

For years now, though, critics have complained that the global war on terror has never really been authorized by Congress.

After the attacks on September 11, 2001 (9/11), President Bush did his constitutional duty. He asked Congress to authorize war against the people who attacked us on 9/11 or anyone who harbored them or aided and abetted those who had attacked us.

If you read the authorization, it is actually very specific. Bush originally asked for more expansive language, but Congress insisted on narrowing the mandate to use force against only those who either attacked us, planned the attack, or harbored the attackers.

Force is authorized against unnamed entities, but they are narrowly defined by their relationship to the attacks of 9/11. Authorization was not given for a global war on "terror" or against radical Islamists or separatists or insurgents in various civil wars. Authorization was not given for "associated" forces.

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<sup>1</sup>The prepared statement of Senator Paul appears in the Appendix on page 31.

Authorization was specific and solely to be directed against the people who attacked us on 9/11 and anyone who helped or harbored them. Period.

It is safe to say that no one in Congress believed that they were voting for a worldwide war on “terrorism” in twenty some odd countries that would go on for decades.

Intellectually honest observers have for years now complained that the 9/11 authorization of war does not cover the wars being fought throughout dozens of countries in Africa, the Middle East, and the South Pacific.

Basically the expansion of the “war on terrorism” really has occurred without the required constitutional authorization.

Senators Corker, Kaine, and others wish to rectify the lapse in constitutional declaration of war by passing a new authorization for force.

I do not disparage their effort. Their motives are genuine. But really there are two big issues here that need to be fully debated.

No. 1: Does it matter who wields the power to initiate war?

Our Founding Fathers believed strongly that it did. They squarely delegated the power to declare war to Congress. Madison put it this way: “The executive is the branch most prone to war, therefore, the Constitution, with studied care, vested that power, the power to declare war, with the legislature.”

Yes, it is the job of Congress to declare or initiate war, and Congress has been negligent for over a decade now. Congress has not done its job. Congress has let President after President strip the war power from Congress and concentrate that power in the Executive.

The second and inseparable issue is: When and where should we be at war?

It is not enough to say Congress should authorize war. The bigger question is where and when should we fight. Our job is not just to put a congressional imprimatur on war. The vast and important job of Congress is to decide when and where we go to war.

The debate that should ensue must ask: Are we to authorize the status quo? Are we to authorize war in all of the theaters that various Presidents have taken us? Or should Congress limit the scope of the worldwide wars we find ourselves involved in?

Here the Corker-Kaine authorization fails us. The Corker-Kaine authorization does not limit the scope of war; it merely codifies the status quo and I would argue actually expands the current theaters of war.

Corker-Kaine authorizes war against at least eight groups that are known to operate altogether in over 20 countries. Hardly sounds like we will have any less war.

Equally concerning is that Corker-Kaine unconstitutionally delegates or transfers an enumerated power from Congress to the President.

Article 1, Section 8 gives Congress the sole power to declare war. Corker-Kaine initially authorizes war against eight groups but says to the President: “Hey, you get back to us and give us an initial list in case we missed anyone we are currently at war with. If you want to add any ‘associated forces’ to the list, please send us a report.”

This authorization transfers the power to name the enemy and its location from Congress to the President.

Worse yet, this authorization changes the nature of declaring war from a simple majority, affirmative vote to require a supermajority, veto-proof vote to disapprove of Presidential wars.

If the President defines a new “associated force” that our military will attack, the only way Congress can stop that President is now a two-thirds vote to overcome his veto.

The Constitution is flipped on its head. This authorization fundamentally transfers the delegated power of war declaration from Congress to the President.

The hearing today is convened to explore precisely that question: Can Congress transfer the power to declare war to the President?

In that context, we will discuss the constitutionality of the Corker-Kaine authorization for war. I hope we will have a spirited discussion.

With this, I would like to recognize the Ranking Member, Senator Peters.

#### **OPENING STATEMENT OF SENATOR PETERS<sup>1</sup>**

Senator PETERS. Thank you, Mr. Chairman, for calling today’s hearing. I continue to be impressed with your willingness to have this Subcommittee tackle the big issues, and no issue certainly is bigger than War Powers.

Voting to send our sons and daughters to war is the most important and the heaviest responsibility that a Member of Congress bears. We must never forget that while the sacrifice of war is borne by our servicemembers and their families, under Article I, Section 8 of the Constitution, the responsibility of asking for that sacrifice is ours.

Yet, today our warfighters are serving in harm’s way in places that have never been named in any declaration of war and facing adversaries that cannot be found in any authorization of military force.

The Framers, in their wisdom, separated the power to declare war from the power to wage it. But, Mr. Chairman, as you have observed, the reality is that we are at war anywhere and anytime the President says so. In failing to assert our War Powers, we have effectively ceded them to the President.

Ceding war powers to the President is a way for us to play it safe. In avoiding a declaration of war, and in keeping force authorizations vague and malleable, we can blame the President when things go wrong.

But we must not shirk our constitutional responsibility in favor of political expediency. We owe it to our servicemembers and their families to roll up our sleeves and to have this debate.

This is not a partisan issue, nor should it be. Congress has not declared war since World War II. President Obama did not seek congressional authorization for the use of military force in Libya, nor did President Trump seek congressional authorization for military action in Syria.

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<sup>1</sup> The prepared statement of Senator Peters appears in the Appendix on page 34.

The 2001 Authorization for Use of Military Force (AUMF) against al-Qaeda has now been used by three Presidents to support combat in countries with no nexus to 9/11 and against organizations that did not even exist then. It offends common sense, in my mind, and that is why I supported Senator Paul's effort to repeal the 2001 and 2002 Authorizations for Use of Military Force.

The world has changed since we last declared war in 1942. Our adversaries often wear no uniform and swear allegiance to no nation. The technology of war has evolved in ways that would be unrecognizable to the Framers. Our military can impact world affairs in an instant with a drone strike directed remotely from inside the United States. How we authorize war must adapt to the changing threats and technologies.

But the principle of separation of powers that animated the drafters of this Constitution is as sound today as it was in 1789. The power to declare war and to authorize military force is Congress' most sacred responsibility. We must reclaim it.

I know that our witnesses have spent a lot of time considering these issues, and I am eager to hear their views. I want to know more about the cost of congressional inaction and ideas for reasserting our constitutional authorities. I am heartened by the bipartisan engagement today and hopeful that we can find solutions together.

I yield back.

Senator PAUL. Thank you, Senator Peters.

Let me begin by noting that several Senators who are not on the Subcommittee have requested to attend due to their interest in the important issue. Therefore, I would like to ask unanimous consent to allow Senators Sanders, Merkley, Lee, and Udall, should they come, to fully participate in the hearing.

Our first witness will be Judge Napolitano, who is currently the senior judicial analyst at Fox News Channel. Judge Napolitano is the youngest life-tenured superior court judge in the history of the State of New Jersey. Following his service, he began teaching constitutional law at Delaware Law School for 2 years and at Seton Hall Law School for 11 years, where he was chosen by the student body as their most outstanding professor. Judge Napolitano has authored seven books on the U.S. Constitution and lectures nationally on civil liberties in wartime, the rule of law, the U.S. Constitution, and human freedom.

Judge Napolitano, you are recognized for your opening statement.

**TESTIMONY OF THE HONORABLE ANDREW P. NAPOLITANO,<sup>1</sup>  
SENIOR JUDICIAL ANALYST, FOX NEWS CHANNEL**

Judge NAPOLITANO. Thank you, Senator Paul. When I asked my bosses at Fox if I could participate in this proceeding, they asked if Senator Sanders was going to be here, and I said, "Yes, he is." They said, "Well, we are dying to see Bernie Sanders cross-examine you. [Laughter.]

I said, "It will not be a cross-examination. We agree on everything."

<sup>1</sup> The prepared statement of Judge Napolitano appears in the Appendix on page 36.



“Well, we will let you go anyway.”

You know me as a commentator on television, and I have also been a professor of law at Delaware Law School, at Seton Hall Law School, and at Brooklyn Law School for a total of 16 years. I have published nine books on the Constitution, and much of my work has concentrated on the separation of powers. We often begin the first day of constitutional law by asking the students: What is the most distinguishing feature of the American Constitution? This is the first day of law school. Most of them will say freedom of speech or protection of privacy. Some of them may even say due process. But I impose upon them the observation that even the constitutions of totalitarian countries guarantee freedom of speech and privacy and due process, but only ours has the strict separation of powers. The structure of the Constitution with the primacy of the Congress in Article I is a profound demonstration of the commitment of the Founders to this sacred ideal. Though Senator Peters has argued eloquently that the separation of powers is the value and the ideal, unfortunately, it is not always the practice because Presidents have assumed that they can utilize military force if they think it is popular because the Congress will sit back and do nothing.

All that is necessary for the triumph of evil is for good men and women to do nothing.

When the Congress looks the other way, as it did when President Obama bombed Libya and when President Trump bombed Syria, this is effectively an amendment of the Constitution by consent. We consent by our silence to the President of the United States usurping the authority that the Constitution gives to us. That authority is unmistakable. If Madison was clear about anything, he was clear that the war power is the most awesome power the government can wage, and it can only be reposed in the Legislative Branch.

The very practical reason for that is war is a failure when it lacks broad public support, and only the Congress has its thumb on the pulse of the people to determine whether war enjoys broad public support.

Now, the President and the Senate have entered into treaties and Congress has enacted statutes which give the President a little bit of leeway. If an attack is imminent, he does not have to wait for the first missile to come. If we have signed a treaty with an ally and the ally needs assistance immediately, he does not need Congress' intervention there because the treaty has been ratified, and under the Constitution a treaty is up there on the hierarchy equivalent to the Constitution itself.

But does the President of the United States of America have the power to bomb another country which poses no imminent threat to the United States of America? The answer is very clear, and it is a loud and resounding no. The President does not have that authority. When Members of Congress look the other way, it is either because of a belief that what the President is doing is popular, let him take the heat; a belief that what the President is doing is wise. We have not been asked to get involved; we do not want to get involved. We are running for election soon. War may be popular. War may be unpopular. Whatever is going through the minds of Mem-

bers of Congress, it is not fidelity to the Constitution. It is not fidelity to the separation of powers.

I was interviewing a Member of Congress whose name I will not mention at the very moment that we broke into the broadcast to announce that the President was bombing Libya. I said, "You are of the same party as the President. What do you think about this?"

"Well, the President does not have the authority to do this. We all know that."

"What are you going to do about it?"

"Probably nothing. We are on spring break. He is in Brazil." This is when President Obama made this announcement and when the bombing occurred. When the congressional break was over and the President returned from his trip to South America, nothing had happened except that the Constitution was weaker and the power of the Presidency was stronger. Gaddafi was about to be killed in a horrific way.

If Gaddafi was so evil that he ought to have been killed by American forces, only Congress can unleash those forces. Madison could not have been clearer.

What troubles me the most is the precedential value that comes about when Congress looks the other way. I am not here to criticize President Trump. This is not an argument about politics. This is an argument about principle. But he had reason to believe that Congress would do nothing, because Congress did nothing in these other instances in which Presidents went to war.

Mr. Chairman, I would argue that the AUMFs are unconstitutional because they do not have an endpoint, because they unleash the President to pursue who he wants for as long as he wishes to do so. I would encourage you to repeal those AUMFs, but not to replace them with Corker-Kaine. Senator Corker is a friend of mine. Senator Kaine is a friend of mine. This is hardly personal. But as you yourself, Mr. Chairman, have pointed out, at the present time the President goes around the world—and I do not mean President Trump. Presidents go around the world looking for monsters to slay, and when it is popular or when in their view it is moral, they slay them, and Congress does nothing about it.

But when this behavior becomes a precedent for future Presidents to do it, when a President in this era can rely on a document of no moral and legal value, like the two AUMFs, and Congress does nothing about it, the Constitution is being amended by consent.

I only have a few seconds left. Corker-Kaine: If Congress decides to withdraw funds for some military excursion, the President will veto the act of withdrawal, and then it will require a two-thirds vote of both Houses to overcome that. A President with one-third plus one in either House can wage war on any target at any time the President chooses to do so. That is so contrary to what Madison intended. So contrary to the plain meaning of the Constitution, so violative of the separation of powers as to be a rejection of the oath to preserve, protect, and defend the Constitution. None of you wants to reject that oath.

I look forward to your questions after hearing from my learned colleagues.

Senator PAUL. Thank you, Judge Napolitano.

Our next witness is Professor Jonathan Turley. Professor Turley is a nationally recognized legal scholar who has written extensively in the area of constitutional law. Professor Turley has served as a consultant on homeland security and constitutional issues and testified before the House and Senate on constitutional and statutory issues. He has been ranked among the top 10 lawyers handling military cases, top 15 most cited public intellectuals, and the second most cited law professor in the United States.

Welcome, Professor Turley.

**TESTIMONY OF JONATHAN TURLEY,<sup>1</sup> SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY**

Mr. TURLEY. Thank you, Chairman Paul, Ranking Member Peters, and Members of the Committee. It is a great honor to come to this Committee to speak about this weighty issue of the Constitution. Indeed, if there is a sacred article of the Constitution, it is Article I, Section 8. It is not merely a constitutional but a moral responsibility.

Indeed, the words “Congress shall have no power to declare war” fail to capture the moral imperative. It is not simply a power but, rather, an obligation that is meant to adhere to each member when you raise your hand and you take your oath of office.

At the earliest stages of our Republic, members began to struggle with this responsibility. Regrettably, S.J. Res. 59 is the ultimate and perhaps inevitable end to that process. The new AUMF amounts to a statutory revision of one of the most defining elements of the United States Constitution.

We find ourselves at this ignoble moment not by accident but by decades of concerted effort by members of this institution to evade the responsibilities given to them by the Framers of our Constitution.

The result is that our citizens are taught, our children are taught a false assertion that members of this body will declare war and have the sole responsibility to do that. After all, the provision speaks loudly to that, clearly to that.

What this does and what past AUMFs have done is to reduce that very loud declaration of irresponsibility to what Macbeth referred to as voices “full of sound and fury and signifying nothing.”

My written testimony details the express intent of the Framers. I would just simply note one aspect that I find most telling. We have plenty of quotes from my favorite Framers, James Madison, but for virtually every Framers, this is one of the few points upon which there was almost unanimity. I say “almost” because Pierce Butler actually proposed to give this entire power to the President of the United States. He did not receive a second. He spoke to a room of Framers and made that proposal, and not a single one seconded that motion.

That was one of the most important moments of our Republic. That silence, the absence of a second, shows where we began, as men of conscience and principle who knew that they had to strike this compromise, to restrict the powers of the Presidency and to give this sacred duty to this institution. It was a compromise. But,

<sup>1</sup> The prepared statement of Mr. Turley appears in the Appendix on page 49.

of course, it is hard to see how that express language got us to where we are today. In almost 250 years, we have had five declared wars with only 11 declarations in those five declared wars.

It actually began poorly. We did not even get out of the 18th Century before members of this institution found ways to get around this duty. When John Adams wanted to start the Quasi War, to his credit they did put forward legislation that referred specifically to the French vessels that could be boarded. But it was not a declaration. We were not even out of the 18th Century before politicians found a way to get around this duty.

Now, our last declaration was in 1942, and that record has made a mockery out of the statement of George Washington in 1793, when he said, "The Constitution vests the power of declaring war in Congress." He added this: "Therefore, no offensive expedition of importance"—"no offensive expedition of importance"—"can be undertaken until they have deliberated upon the subject and authorized such a measure."

We have made a mockery of that statement. We have made a mockery of Article I and Section 8.

Now, before I mention some of the flaws I see in this legislation, I want to know one thing, and this sort of reflects my friend in terms of what he said. There is a path dependence with AUMFs. There is an assumption that we should only be debating the scope and the standards by which a President has to satisfy. There is still the original question. Many of us do have constitutional reservations about the AUMFs. If anything, the wisdom of the Framers has been made evident in our modern history. We are at war everywhere, always. We have forever war. It was not the Framers' fault. That is in direction violation of what they thought would prevent it. They hated war. Framers despised it. They believed that Presidents and chief executives were naturally inclined toward war. That is why they made this such a clear standard.

Now, in my testimony I talk about the problems that I see in this proposal and why I think it is worse than the current AUMF, which takes quite an effort. I will not go through all the details about how the new nations or countries are added, the associated forces, or the shift from an ex ante to an ex post action. All of those are fundamental flaws that go even further from where we were.

The ex ante/ex post problem I think is really the signature moment of this law. This body has failed historically to require a declaration, so they got rid of the declaration. Then they failed and got rid of the need to specify as to which nations we are going to go to war against. Now they are about to get rid of even the requirement to get any type of prior authorization. It will make this body a pedestrian to war, and it will put war-making on autopilot.

This law does not even have a sunset provision. It just goes on. I could see why that is so tempting to have. It certainly relieves members of this body of the rather uncomfortable questions that do come up.

But in my remaining few seconds, I will simply note this: Under the past circumvention of Article I, Section 8, under the former AUMFs, we have gone through 17 years of war. You adopt this proposal, we will have 170 more, because this has virtually no stand-

ards. It will effectively revise the Constitution of the United States without an amendment.

I have had the honor of testifying before this body, also your counterparts in the House, many times. But today I took a step that I have not done before, and I have asked two of my sons to come with me. I have four children. My sons Aidan and Jack are behind me. They are both either at draft age or about to be at that age. I felt that they should be here to watch part of this process because they may well be asked to pay the ultimate price for the authority that Congress may soon bestow upon the President.

If called, I know they will do their duty, as did their grandfather and great-grandfather and other people in my family in previous wars. I do not have any question about them doing their duty. But I do have a question whether the members of this institution will do their duty and stand with the express language of the Constitution, reject this proposed AUMF, and show the Framers that the faith that they put into this body was well placed.

Thank you again for the honor of appearing before you today, and I would be happy to answer any questions you might have.

Senator PAUL. Thank you, Professor Turley.

Our next witness is Christopher Anders. He is the Deputy Director of the Washington Legislative Office of the American Civil Liberties Union (ACLU). Mr. Anders leads the ACLU's Washington-based advocacy on topics of war authority, detention, torture, and Guantanamo issues. He has also written extensively on the topic of the Authorizations for the Use of Military Force, declarations of war, and separation of powers. Mr. Anders.

**TESTIMONY OF CHRISTOPHER ANDERS,<sup>1</sup> DEPUTY DIRECTOR,  
WASHINGTON LEGISLATIVE OFFICE, AMERICAN CIVIL LIBERTIES UNION**

Mr. ANDERS. Thank you. Chairman Paul, Ranking Member Peters, and Members of the Subcommittee, the American Civil Liberties Union would like to express our appreciation to you for holding this hearing today.

No decision by government is graver or more consequential than the decision to go to war. Over the many years since Congress passed the AUMF in 2001, the ACLU has dedicated ourselves to defending civil liberties and human rights that have been jeopardized by, at best, tenuous claims of the 2001 AUMF as legal authority, or more chillingly, by Presidential claims of Article II authority in a complete absence of any advanced congressional authorization.

These harms have included the drone killings of even an American citizen, broad surveillance of American citizens, the kidnapping and torture of suspects, and indefinite detention without charge or trial, even of an American citizen apprehended here in the United States.

While it would be impossible for one Congress to undo the damage of nearly 17 years of Presidential overreach and congressional negligence, we propose in our written statement a three-step process for Congress to reclaim its exclusive constitutional authority to

<sup>1</sup>The prepared statement of Mr. Anders appears in the Appendix on page 65.

decide whether the United States should be at war. For now, in my oral testimony I will focus on the most pressing first step.

Dr. Paul, to apply to Congress the first principle of medical care, “First, do no harm,” the top priority for this Senate must be to ensure that S.J. Res. 59, the Corker-Kaine AUMF, does not become law. It would be hard to overstate the depth and breadth of the dangers to the Constitution, civil liberties, and human rights that would be caused by the Corker-Kaine AUMF. The damage would be colossal. Not only would it almost irretrievably cede to the Executive Branch the most fundamental power that Congress has under Article I of the Constitution—the power to declare war—but it also would give the current President and all future Presidents authority from Congress to engage in worldwide war, sending American troops to countries where we are not now at war and against groups that the President alone decides are enemies, against groups that do not even exist today.

The Corker-Kaine AUMF would authorize force, without operational limitations, against eight groups in six countries. The President could then add to both lists, as long as the President reports the expansion to Congress. To be clear, the President would have unilateral authority to add additional countries—including the United States itself—to the list of countries where Congress is authorizing war. The President would have unilateral authority to add additional enemies, including groups in the United States itself and even individual Americans under its new authority for the President to designate “persons” as enemies.

Although Congress could bar an expansion to additional countries or additional groups, such action would effectively require a two-thirds majority of both Houses, given that the President presumably would veto legislation to curtail an expansion that the President himself has ordered. Every President for the coming decades would effectively be able to claim for the Executive Branch much of the power that the Constitution gives to Congress and gave to Congress exclusively.

Before closing, I want to point out a sleeper provision with the innocuous title “Section 10 Confirming Amendment.” This provision greatly expands the scope of the infamous 2012 National Defense Authorization Act (NDAA) indefinite detention provision. In its single sentence, Section 10 of the Corker-Kaine AUMF would expand the NDAA indefinite detention authority by adding this new AUMF as a basis for the military to capture and imprison individuals in indefinite detention without charge or trial. The Corker-Kaine AUMF, like the NDAA detention provision itself, has no statutory prohibition against locking up American citizens or anyone picked up here in the United States itself. While we continue to believe it would still be unlawful for a President to try indefinite detention of an American citizen in the United States (again), there is no reason for Congress to risk it.

When Congress considered the NDAA indefinite detention provision in 2012, the uproar from across the political and ideological spectrum was deafening. But it narrowly passed, and President Obama signed it. When the President signed it, he made a promise, as part of his signing statement, that he would not use it against American citizens. But that is it. It was a promise. He never said

and nowhere did either President Obama or President Trump deny that either they or future Presidents would have the power to order military detention. The loaded gun was left on the shelf. The Corker-Kaine AUMF would make the NDAA detention provision an even greater threat to civil liberties and human rights.

While we share the frustration of many Senators with expansive Presidential claims of war authority, including Senators Corker and Kaine, who have over and over again expressed their frustration with that, the proposed Corker-Kaine AUMF would cause far greater problems than it would solve. The ACLU strongly urges all Senators to oppose the legislation.

Thank you again, Mr. Chairman, for holding this hearing and considering these views.

Senator PAUL. Thank you, Mr. Anders. Because I believe in being kind and welcoming to guests, we are going to let our guests go first today, and we will start with Senator Sanders.

#### **OPENING STATEMENT OF SENATOR SANDERS**

Senator SANDERS. Senator Paul, thank you very much for holding this hearing, and let me thank our panelists for, without exception, their very cogent testimony.

Article I, Section 8 of the Constitution states very clearly, and I quote, "Congress shall have the power to declare war." The Founding Fathers gave the power to authorize military conflicts to Congress for one very simple reason: Congress is the branch of the government that is most accountable to the people.

There is no question but that over the years Congress has allowed its authority over this very important issue of war-making to ebb. It is time for us to reassert that authority and to start asking some very tough questions about the wars—and I use the word "wars," W-A-R-S—that we are currently in.

Now, some people may think that this is an interesting abstract discussion. We have brilliant constitutional scholars, wonderful intellectual debate. But let me assure every person here that the abdication of Congress to its responsibilities over war has had incredibly dire and horrific consequences for the people of our country and, in fact, the world.

I want to bring this down to earth and away from an abstract although enormously important constitutional discussion. I want to give you three examples in recent American history where Congress did not ask the right questions, abdicated its responsibility, and the consequences were enormous.

Very few Americans know that when we deal with Iran, very much in the news right now—how many people know that in 1953 the United States along with the British overthrew the democratically elected government of Mohammad Mosaddegh, reinstalling authoritarian rule under the Shah? In 1979 the Shah was overthrown, and the Iranian Revolution brought into power an extremist anti-American government. In 1953 the U.S. Government, without congressional approval, thought that it could simply remove the Government of Iran in order to protect wealthy oil interests. What has been the consequences of that over the years? Congress abdicated its responsibility.

The second one, more relevant to my generation, was the war in Vietnam. Now Iran took place under Eisenhower, a Republican. In 1964 Lyndon Johnson, a Democrat, otherwise in my view a very great President, but in this instance cited an attack on a U.S. ship in the Gulf of Tonkin as a pretext for escalating the U.S. intervention in Vietnam. But we now know from his own recordings that Johnson himself doubted that story about that attack. Johnson's Administration misled both Congress and the American people into a war that resulted in the loss of over 50,000 American soldiers and over a million Vietnamese. Congress was lied to. There was no serious debate about American intervention in that war.

The third example, more recently, that we all remember was Iraq. Today it is now broadly acknowledged that the Iraq war was a foreign policy blunder of enormous magnitude. In this case, the Bush Administration lied to the American people, claiming that Saddam Hussein had weapons of mass destruction. The result of that war, the loss of thousands of brave American soldiers, the displacement of millions of people in the Middle East, and bringing us to where we are right now.

In other words, what we have seen is time and time again disasters occur when Administrations, Democrat and Republican, mislead Congress and the American people and when Congress fails to do its constitutional job in terms of asking the hard questions of whether or not we should be in a war. I think we need to ask that very hard question today.

Here is the point that I hope the American people are asking themselves. Is the war on terror a perpetual, never-ending war necessary to keep us safe? I personally believe that we have become far too comfortable with the United States engaging in military interventions all over the world. After 9/11 Congress passed an Authorization for the Use of Military Force "against those responsible for the recent attacks launched against the United States." The following year Congress passed the 2002 AUMF against Iraq.

We have now been in Afghanistan for 17 years. We have been in Iraq for 15 years. We are occupying a portion of Syria, and this Administration has indicated that it may broaden that mission even more. We are waging a secretive drone war in at least five countries. Our forces right now as we speak are supporting a Saudi-led war in Yemen which has killed thousands of civilians and has created the worst humanitarian crisis on the planet today.

Clearly these outdated and expansive AUMFs have been used by three different Administrations, Republican and Democrat, as a blank check for the President to wage war without congressional consent or oversight. Meanwhile, we are currently "fighting terrorism" in some 76 countries, with an estimated cost of \$5.6 trillion and untold lives lost since 2001.

I think it is very clear—and our panelists I think made the point extraordinarily well, without exception—that the time is long overdue, Mr. Chairman, for the U.S. Congress to respect the Constitution of this country, to stand up for that Constitution, and to demand that it is the Congress of the United States, not a President, who determines whether our young men and women are put in harm's way.

Thank you again, Mr. Chairman.



Senator PAUL. Thank you.  
We will next turn to Senator Merkley.

#### OPENING STATEMENT OF SENATOR MERKLEY

Senator MERKLEY. Thank you very much, Mr. Chairman, for setting up this hearing.

Under what authority do each of you feel that we are currently in Syria taking on Islamic State of Iraq and Syria (ISIS)? Judge Napolitano?

Judge NAPOLITANO. I do not think we are in Syria by any constitutional authority because, like your colleague Senator Sanders, I do not believe that either of the AUMFs were constitutional because they did not adequately articulate a target and they did not put in there an endpoint. But Presidents of both parties have used sort of the vague principles that they believe are emanating from the AUMFs to justify the type of incursion that you are asking about.

Senator MERKLEY. Mr. Turley?

Mr. TURLEY. Actually, I see no authority even under the AUMFs, certainly not under the Constitution. It is unfortunately a less than noble lie that we have seen come out of the AUMFs has been that there has been the specificity as to targets, which was there really for public consumption. This proposed legislation has that same technique. It gives some specific references while having provisions that that list can be expanded almost at all by the President subject to a retroactive or some post hoc action by Congress.

Senator MERKLEY. Mr. Anders, do you see any current constitutional authority?

Mr. ANDERS. No, and at the time that the government made the decision, the Obama Administration made the decision to claim that the 2001 AUMF was authority to go after ISIS fighters, Chairman Paul, had legislation in that was a declaration of war focused in on—for 1 year, on ISIS. That was a constitutional way to take on that fight. What they did instead was that they had this very tortured interpretation of the 2001 AUMF and applied it to a group that was actually at war with core al-Qaeda.

Senator MERKLEY. Thank you. The reason I asked you the question is three esteemed experts have just clarified that we do not have a constitutional authority and yet our forces are in this battle in Syria. I wanted to use that as a way to dramatize what has happened since 2001 in which there was a very precise AUMF, very carefully constricted to those who attacked us on 9/11 and those who harbored those on 9/11. Since then it has been stretched and expanded to country after country, organization after organization. I think you all agree with that characterization of 2001 being stretched beyond recognition such that it does not really provide a constitutional foundation for current conduct of military forces in these countries.

Now we are at this point, this point at which people are saying 2001 should not be allowed to continue. It has been abused so much, and we have the Corker-proposed AUMF. I have an impression that when you analyze the details of it and what it authorizes, in multiple organizations and multiple countries, with the President allowed to add an additional list, and that that additional list

can be added without preauthorization by Congress, that it essentially codifies the expansion, the stretching of the 2001 AUMF. Is that a fair way to describe it?

Judge NAPOLITANO. Yes, it is a loaded gun.

Senator MERKLEY. OK. Yes?

Mr. TURLEY. Yes.

Mr. ANDERS. At a minimum, yes.

Senator MERKLEY. Senator Corker, who I deeply respect for having wrestled with the 2001, and Senator Kaine have tried to figure how to replace 2001, they have come up with this proposal which disturbs me for the reasons that you all have been sharing. But Senator Corker fairly said, "So if you all do not like this, what would you do?" Mr. Anders, you mentioned—I think your closing comment was you encourage members to consider presenting what could be done as an alternative. I have presented such an alternative. I do not know if each of you is familiar with it. But one of the things it does is have a sunset in it, so it periodically would require us as the Senate and House to re-examine the foundations and the considerations.

Do each of you think a sunset is an important provision in an AUMF so we do not have unending war without reconsideration or reauthorization by Congress?

Judge NAPOLITANO. A sunset, Senator Merkley, is certainly helpful because it compels the Congress, the representatives of the people, periodically to review what the President is doing in their name. My own view would be legislation which simply says the President shall not use military force—military or civilian, because Presidents use intelligence forces and thereby bypass the War Powers Resolution.

Senator MERKLEY. Well, my time is going to run out.

Judge NAPOLITANO. I did not mean to take—except in accordance with the Constitution.

Senator MERKLEY. Mr. Anders, I know you have seen what I have put together to try to very tightly constrain just to two countries and three forces, put a 3-year sunset on it, and require any expansion of that by the President, including an expansion to ground forces, to require preauthorization so we have the constitutional vision represented in that AUMF. Any insights on whether that puts us more clearly on the track envisioned in our Constitution?

Mr. ANDERS. Yes, we are really pleased with how you put together your AUMF. We do not take a position, the ACLU has never taken a position on whether the United States should be at war against a particular country or a particular group. But in terms of how it fits with the Constitution's separation of powers, the AUMF you put together fits very well. It is up to Congress then to make that decision on do we want to, as a country, be at war with these particular groups and these particular countries. But in terms of kind of fitting into a constitutional framework, yes, it does.

Senator MERKLEY. I just want to note that several of you pointed out that Members of Congress are uncomfortable with having to make these tough decisions. It is easy to take what was vested in Congress and simply deliver it to the executive and let them take the heat.

I find that unacceptable. I find this inversion of the Constitution, this proposed inversion in which the President can go at forces in new countries, new organizations, deciding on his or her own whether or not it meets the test that is in the AUMF, and that Congress would have to come around after our forces are deployed and get a supermajority of both chambers to close the door, something that nobody thinks Congress would ever do, so in sum we end up with a wholesale transfer of our responsibilities carefully crafted. It is tough for us to make these decisions, but it is our responsibility, and it is why we need to craft a replacement AUMF that honors that vision of the Constitution and makes us have the tough debates and the tough votes.

Thank you.

Senator PAUL. Senator Udall.

#### OPENING STATEMENT OF SENATOR UDALL

Senator UDALL. Thank you, Mr. Chairman, and I really appreciate your calling this hearing and having these three experts before us here.

Mr. Anders, I asked the following question of Secretary Pompeo over at the Foreign Relations Committee, and I wanted to get your perspective on this. The Chief of Staff of the Army, General Milley, reminded us recently in an Appropriations hearing on the nature and character of war. The traditional idea is that war at its base is an extension of politics. War forces our will on the opponent through military means to reach a political objective. Taking an expansive view of what Congress approved on 9/11, the political objective is to stop terrorism at a broad level. However, a more restrictive view and the view that was sold to Congress when I voted in favor of that 9/11 AUMF was that we aim to punish and deter the perpetrators of the 9/11 attacks, specifically al-Qaeda and the Taliban. Which view do you believe is the correct one, Mr. Anders?

Mr. ANDERS. That is easy. I think it is the narrower view. I think Congress at that time worked hard to come up with specific language, and there was a back-and-forth that has been reported on quite a bit—it was reported on at the time—between the White House and drafters in Congress on coming up with that language. The part that is frustrating I think for all of us now is when we talk about a new AUMF, we are talking about the need for specificity and naming your objectives and naming the enemy. It is hard to see how that 2001 AUMF could have been made more specific than it was in terms of naming what the objective was and who it was that the United States was going to war against than what it is.

The only shortcoming in it was that given that the United States at that time did not know the exact names of who it was we were at war with, it did not include the exact names, but other than that I think it is pretty clear that it was for core al-Qaeda because of their role in the 9/11 attacks and the Taliban for harboring them, period.

Senator UDALL. One of the restraints on war was recently put in a commentary by Dr. Sarah Kreps over at Cornell, and she is the author of a new book called "Taxing Wars: The American Way of War Finance and the Decline of Democracy." She really makes the

point that when you have a tax on war, you are involving everyone. Everyone understands that the society as a whole is backing this war.

In the distant past, we paid for wars with war taxes. More recently, Members of Congress have proposed these taxes to raise public awareness about the cost of war and to share the sacrifice beyond a small percentage of Americans who fight in these wars.

What do you think of a proposal for a war tax, other than digging us deeper into debt?

Mr. ANDERS. I do think the bigger point of having the country have a greater investment and a greater knowledge of what the costs of war are, one of the problems that we have had with the lower cost of war in terms of American lives and American treasures with the use of drones and new technology is that a lot of the more obvious costs of war are not as apparent. Focusing in on what the financial costs are would probably be a very helpful way for people to have a better understanding of the full extent of what this actually means.

Senator UDALL. I think you would end up having a debate about whether or not to commit ourselves to many of these very dangerous situations.

Along that same line, some people, when I go home and do town hall meetings and hear from my constituents, have asked: Why are we not seeing people in the streets like in Vietnam or anti-war activity on our campuses? The answer I always get is there is no draft. Should we relook at this? Do you consider a draft a check on foreign wars?

Mr. ANDERS. In the past, certainly—I have been at the ACLU 20 years; it predates my time there. But I know we have had a lot of concerns historically about a draft in terms of its impact on civil liberties and also in terms of equality and who is subject to it. That is not a proposal that we are supporting.

Senator UDALL. The Office of Legal Counsel (OLC) recently released its legal justification for the strikes in Syria. The memo states that the President identified three interests in support of the April 2018 Syria strikes: one was the promotion of regional stability; two, the prevention of a worsening of the region's humanitarian catastrophe; and, three, the deterrence of the use and proliferation of chemical weapons.

The OLC relies on the President's Article II authority, and as Harvard professor Jack Goldsmith says, the Justice Department now officially and publicly believes the President can use significant air power without congressional authorization on the grounds of humanitarian intervention and deterrence of the use of chemical weapons.

I find that OLC opinion extremely alarming. Do you agree with the Justice Department that these strikes can be justified via Article II authority alone?

Mr. ANDERS. As disturbing as some of the claims made based on the 2001 AUMF have been, that opinion, the May 31, 2018, opinion on Syria strikes, strikes on Syrian targets and the April 1, 2011, opinion during the Obama Administration from the Office of Legal Counsel on the air campaign against Libya are chilling. They both are essentially the President claiming for himself the war authority

that the Constitution gave to Congress alone. They are very expansive claims, and I think a lot of us thought that the Libya opinion was about as aggressive and as expansive as one could be, and that was only topped last week with the one on Syria. I do think it is a challenge for the Senate to figure out how to use the legislative process to pare that back, to invalidate those opinions and those relying on them, but ultimately that is probably going to require also using the power of the purse and cutting off funds for unauthorized military campaigns.

Senator UDALL. Chairman Paul, thank you so much for this hearing.

Senator PAUL. Thank you. Senator Lee.

#### OPENING STATEMENT OF SENATOR LEE

Senator LEE. I want to thank Senator Paul for organizing this hearing, and I want to thank the three of you in particular for your willingness to come and offer your expertise and insights that you have offered today, which are really helpful.

We are now in our 17th year of deployment under the 2001 Authorization for the Use of Military Force. It is not yet the case that our most junior personnel deployed were not born as of the moment that 2001 AUMF was issued by Congress, but it will soon be the case. Long before it is even fathomable that we will have retreated from these battlefields, it will be the case that this AUMF was issued before they were born.

In the meantime, we have some issues to deal with. We have spent \$2.8 trillion in these efforts under the 2001 and 2002 AUMFs, and there is not a lot of accountability that comes when Congress continues to look the other way or tolerate ongoing efforts, ongoing deployments consistent with those 2001 or 2002 AUMFs without having additional discussions on what exactly we are doing, on why U.S. blood and treasure should be put on the line.

Instead of the people's elected representatives debating and discussing these things in real time, these issues have been left to the will and the whim of a small handful of political elites in Washington, DC. This is scary, and it is contrary to the text, the structure, the history, and the tradition underlying our Constitution. It is one of the reasons why I welcome this hearing and why I think we need to have this discussion.

I have a few questions. We will start with you, Mr. Anders. Earlier this year, as you are probably aware, Members of Congress receive a letter from the Department of Defense (DOD) relying on a 1975 argument suggesting that the only time Congress has an indispensable role in authorizing U.S. forces to be deployed is when deployed units of U.S. forces are on the ground engaged in a kinetic exchange. Do you agree with that? If not, why?

Mr. ANDERS. No, we do not agree with that. First of all, it is Congress' exclusive authority to provide authorization in advance before a military engagement in the absence of a need to repel a sudden attack, and that is the constitutional standard.

Senator LEE. It is often now how we fight wars today, anyway. There is lots of kinds of warfare that we engage in today that does

not necessarily involve a kinetic exchange between people on the ground.

Mr. ANDERS. That is right, and I think, this again is something that began during the Obama Administration, this definition of what “hostilities” mean under the War Powers Resolution, and the position that President Obama eventually took was that hostilities did not include air power in the absence of ground troops. That, of course, means that lots of places, as you just referenced, where the United States is at war are not considered hostilities. Therefore, the War Powers Resolution, which it does include deadlines for withdrawing in the absence of congressional authorization, do not apply. With that opinion from Harold Koh, then the legal adviser at the State Department to President Obama, the Executive Branch pretty much wrote out of existence a good part of the War Powers Resolution.

Senator LEE. Which is of concern to many of us here and ought to be more so than it is within Congress.

Professor Turley, as you know, it was well understood at the time of the founding and was made an understanding based on how the Constitution was written that the President, unlike the King, would not have unilateral power to go to war. In fact, Hamilton makes this point in Federalist No. 69. When people talk about the immense power vested in the Executive to deploy military personnel, from what source are they claiming that authority exists?

Mr. TURLEY. There is no source. The interesting thing about this particular provision in Article I, Section 8 is it was viewed at the time as the defining work of the Convention. The Framers joined together—who were normally not in agreement—and said this is how we can address this defining issue. They all agreed that they did not want a situation like the one we have today where a President has this type of unilateral authority, and they believed they had fixed the problem because Article I, Section 8 could not be more clear.

To fold this back to the question that you asked my colleague, the definition that the President put forward of this kinetic conflict was used in the litigation that I led on behalf of Democratic and Republican members. The Obama Administration came forward when we were challenging the Libyan war as an undeclared war and came into court and said, “You know what? It is not a war by our definition.” When they made that argument, they went further than that, and they said, “The President alone defines what war is.”

Now, we responded to the court and essentially asked, “Does that track with you? Do you honestly think that the Framers put this specific of an obligation, spent this amount of time, and it all comes down to a noun that the President is simply allowed to define?”

By the end of the litigation, by the way, I had no better idea of what “kinetic” means in wartime than I did before.

Senator LEE. It means you are hitting stuff, I think.

Mr. ANDERS. Yes, I guess so. But it got to that point of absurdity. This is all an effort to avoid clarity, you try to—change the noun, if you cannot deal with the obligation.

Senator LEE. To avoid clarity, I think that is a good description, to avoid clarity in a place where morality, decency, and justice

would seem to demand clarity and where the Constitution provides clarity.

Judge Napolitano, I want to talk to you for a moment about the associated forces doctrine. Executives from both political parties for decades now have used this as justification for a number of military operations. But when I read the text of the 2001 Authorization for the Use of Military Force, it seems somewhat clear to me that it covers a fairly narrow scope of targets, to include “those nations, organizations, or persons that he”—“he” being the President—“determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”

Can you explain to me the limits of this AUMF, meaning what groups or geographic regions the U.S. could legitimately go into under this authority?

Judge NAPOLITANO. Senator Lee, I have argued that the AUMFs, both of them, 2001 and 2002, are unconstitutional because they fail to include an endpoint. That is the reason we are having this hearing today, because Presidents have used these to go wherever they wanted to go. George Orwell predicted all of this when he said words would determine liberty. If the President can define war rather than the Congress defining war, he or she will define it in a way to facilitate his or her use of it.

At one point the Obama Administration argued that the use of intelligence forces on the ground who were not wearing uniforms with insignias on them is not the same as military forces on the ground. They looked a little different because they did not shave every day, but they were carrying the same type of offensive weaponry with which to kill people that had not been authorized by the Congress.

The use of the phrase “associated forces” and permitting the Commander-in-Chief to define what those mean—I used this phrase earlier with Senator Merkley—is like, Justice Jackson said, dissenting in *Korematsu*, “a loaded gun” in a desk drawer of the President, ready for him to take it out and shoot it whenever he wants.

Senator LEE. Well said. I see my time has expired. Thank you, Mr. Chairman.

Senator PAUL. Senator Peters.

Senator PETERS. Thank you, Mr. Chairman. Gentlemen, thank you for your testimony here today. It is certainly an interesting discussion.

I wanted to take my time and discuss something that is actually happening today and get your sense of what you are seeing and your thoughts. Today the Senate, as you know, is starting debate on the National Defense Authorization Act for 2019, and the bill that was before us includes a provision that will allow the Secretary of Energy to pursue development of a low-yield nuclear weapon without first receiving specific authorization from Congress.

I voted against this provision as a member of the Armed Services Committee, and it literally strikes from current law a requirement that a new low-yield nuclear weapon be “specifically authorized by Congress,” and it replaces it with a provision that will allow the

Secretary of Energy to decide on his own whether or not to go forward.

The provision that is struck was a limitation that Congress put in place about 15 years ago to ensure that the legislature and not the Executive Branch would make such a highly consequential decision. I would argue if Members of Congress think that our arsenal needs a low-yield nuclear weapon that we should debate it, we should authorize it, and do it in full view of the American people as existing law requires. Instead, some are trying to change the rules to allow the Executive Branch to make this decision without congressional approval. I think that is fairly clear.

For the panel, what are your thoughts? Is this an appropriate delegation of congressional responsibility?

Judge NAPOLITANO. In my view, Senator Peters, it is not. I would have commended you and do commend you for your vote and for your understanding. The point I tried to make in my initial comments was it is often the subtle and unseen passage of power from the Congress to the President that comes back to wreak the most havoc. Quite frankly, as a person who monitors this, I was unaware until you discussed this just two minutes ago that this is being debated by the Senate today. This is profoundly hideous and utterly unconstitutional that bureaucrats in the Executive Branch would have power that Madison and Company expressly gave only to the Congress.

Senator PETERS. Any others?

Mr. TURLEY. I would simply add that I do find it very problematic in terms of using the appropriations process as a substitute for an authorization and a full debate. You have two former House pages here. We will not tell you the years we served. But you can look it up because of what I am about to mention. When I was a House leadership page, we had the debate over the neutron bomb of whether to allow the neutron bomb to be developed or whether it was a new type of weapon that would make nuclear war more feasible and, therefore, more likely.

I stood there on the House floor listening to that long debate that went into the earliest hours. It was one of the most profound experiences of my life, and I came away with a deep respect for members on both sides that spoke honestly, directly about the consequences and the issues behind that type of weapon. I remember thinking as a young page that this is a pretty great place when we debate whether we should do something, not whether we could do something, and what implications does it have not just for us but for the world. That is a debate that I think you should always want.

The other point I was going to mention is in my testimony I talk about the problems that we are having not just with the failure of Congress to carry out its duties under Article I, Section 8, but its collateral failure to deal with its obligations under the appropriations powers. When we litigated against the Libyan war, one thing a lot of people did not realize is that war was completely paid out of loose change. Congress never appropriated money for the Libyan war. We did an entire war that was paid for because Congress gives so much money to the Defense Department, they can actually



have a war based on the money you give them and do not commit to. The failure is on both sides of this issue.

Senator PETERS. I appreciate that. Mr. Anders, I am going to ask you to answer a slightly different question, but picking up from this debate on nuclear weapons, the consequential nature of them, and why congressional input and debate is, in my mind, essential and it seems as if both of our previous witnesses would agree with that. I spend a great deal of time thinking about the future of warfare, which is going to change in absolutely dramatic ways. I am intimately involved in self-driving cars and autonomy and things that are happening in that scope. It is driven by artificial intelligence and machine learning. The face of warfare will be radically changed in the next 5 to 10 years. I think it raises some profound issues certainly of the morality and ethics of what we are dealing with, but also some significant policy issues, and perhaps a view of what Congress' involvement should be given the fact that this technology is changing rapidly and our adversaries may not be bound by the same types of constraints that we have here.

I want to get your thoughts. What should we be thinking about in terms of war powers given the fact that technology will be changing dramatically and in profound ways? I know you mentioned a little bit about that earlier, Mr. Anders. I would like to have your thoughts.

Mr. ANDERS. Yes, I think this is one place where the need for specificity, the need for controls, and the need for limitations put in at the get-go is really important. I think, there are instances where there are members of the Foreign Relations Committee that have come up with various amendments to various AUMFs set in front of them limiting operationally what can be done in different theaters of war. But I think, kind of even more fundamentally, limiting the geography and limiting who the enemy is are particularly important. Going a little bit back to the question about the provision today, I think if Congress has not learned anything over the past couple decades other than that when it is a one-way ratchet wrench with turning any kind of authority over to the executive branch, if you provide discretion to the executive branch, you are not getting it back.

The starting point for an Authorization for the Use of Military Force or a declaration of war or any kind of new weaponry ought to be controls imposed by Congress. If later on those controls needs to be loosened, then loosen them. But, the greater and the tighter control you put on from the start, the more likely it is that Congress is going to retain that authority.

Senator PETERS. I am out of time, Mr. Chairman, but if anybody had a quick thought on that, I would entertain that.

Judge NAPOLITANO. Fully agreed.

Senator PETERS. Good. Thank you.

Senator PAUL. Thank you, Senator Peters.

It was mentioned earlier that our soldiers within the next year will actually have been born after 9/11 and have no memory of it. We have been at war that long. Even many in the audience here today are young enough that they may not remember 9/11. It is not to say it was not something profound, and we needed to respond. But we are still at war, and I think we have lost our mission.

I asked Secretary Pompeo when he was before us, is there a military solution to Afghanistan, and he frankly said no, and he is one who still wants to stay. My question is: If there is no military solution, why would we add more troops? I am reading Steven Coll's book now, "Directorate S," about Afghanistan and Pakistan, and in 2010 the Obama Administration admitted there was no military solution. In the book there is a discussion, and it says unanimously everyone agreed there was no military solution in 2010. We have to wake up and do something. That is part of what this hearing is about. But it is also about the constitutionality of authorization to use force, a declaration of war.

I think that it is important that we review these again. There is one, possibly two reasons why this is unconstitutional, and we will start there. One, I think it delegates authority that is congressional authority given by the Constitution to Congress to the President. Why do we not start with Judge Napolitano and Professor Turley? How is that unconstitutional? Is there a possibility that we can go to court? Is there evidence that we have ever had a delegation doctrine overturned where Congress delegated some of their authority they were not allowed to do? Judge Napolitano first.

Judge NAPOLITANO. Professor Turley is the country's expert on getting cases sent to court that seem impossible because it looks like there is no standing, but he manages to find it, so I will let him address that. But the Supreme Court has held countless times that just because the branch of government that is losing the power consents to that loss does not make it constitutional because the separation of powers doctrine was not written to preserve the prerogatives or the hegemony of the three branches but, rather, to preserve human liberty by keeping the branches at tension, Madison even said jealous of each other.

The problem, of course, is getting the courts to examine this. There have been some examinations, but they are few and far between. Professor Turley is an expert on that because most of the time the court will say, particularly with respect to war—I am not talking about Congress saying to the FDA you can make all the regulations you want about toothpaste. We are talking about with respect to war, the courts are more likely than not to say that is a political question. If you do not like the war, elect a new President or elect a Congress that is more faithful to its oath to uphold the Constitution.

But just because that power passes from legislative to executive with the consent of both does not make it constitutional. In fact, the core authorities of each branch may not be exchanged, mixed, or commingled with either of the other branches. If the court is clear on anything, it is clear on that.

Senator PAUL. Professor Turley.

Mr. TURLEY. Thank you very much. There is this strange anomaly which is largely a creation of the judiciary that exists today. Most people, when they learn civics, believe that if something is unconstitutional, then the courts have a chance to review it. The sense is that the checks and balances work in the tripartite system because no one can act alone.

Unfortunately, that is not true because the courts have developed narrowing standing doctrines that I have long been a critic of. You

actually can have glaring unconstitutional acts where the court will not recognize anyone as having a right to raise them.

For example, in the Libyan war case, I came forward with both Democratic and Republican members who said, look, we take an oath, and that oath includes upholding the Constitution, which includes an obligation, a sacred one, to declare war. We were denied that right, and so we have standing.

Senator PAUL. Is the standing issue a problem at every level, district court, appellate court, and at the Supreme Court?

Mr. TURLEY. It is, and the court on that occasion said no. When I pressed the court, saying then we have here an immaculate violation of the Constitution, literally no one can stop an undeclared war, even though the Framers considered this one of the great violations they sought to avoid.

Now, when I went back to the court, when I represented the House of Representatives as a body, there was a fierce level of litigation, but we won that standing battle. The court accepted that as a representative of one of the House, my clients would have standing.

I really believe that——

Senator PAUL. Then did it go beyond the district court or——

Mr. TURLEY. It went to the court of appeals and eventually it ultimately proved moot because of the changes we——

Senator PAUL. You did not lose on standing.

Mr. TURLEY. We did not. We won on standing, and that thankfully is still there. But I believe legislative standing would solve a lot of this problem if Members of Congress were recognized as having skin in the game.

Senator PAUL. But it sounds like it is overwhelming within the Federal court structure that both precedent and opinion will not change unless all of a sudden the majority of the Supreme Court sort of set a new way on standing?

Mr. TURLEY. That is not impossible. The fact is this is a creation of the courts, and it can be undone by the courts. But it is not working.

Senator PAUL. In *Hampton v. United States*, they set forth, like a lot of things the Supreme Court does, and said you are not supposed to do something, well, you can do it if it is intelligible or reasonable, and we get all these extra doctrines added in, which I think basically dilute what you were not supposed to do once upon a time, according to the Constitution. But in that they said you cannot delegate your war-making authority, but you can give up some of it if you have an intelligible principle upon which to act. Have there been further decisions in that vein? Is that sort of a last standing precedent as far as this goes with war powers? Are there other courts cases that we can look to that are instructive in this? We will start with Professor Turley and then Judge Napolitano.

Mr. TURLEY. Actually, I think there is some reason to be hopeful, particularly in the war powers area, but also more generally in terms of separation of powers. I had the honor of testifying in the Gorsuch confirmation hearing, and one of the things I said about Justice Gorsuch as a nominee is that he had a certain refreshing understanding of the separation of powers, and some people view

him as a textualist in that sense. But we really cannot change the center of gravity here and move it back toward the legislative branch, because right now we have a dangerous instability, and so far Madison—you will never hear me say this in a given day, but I will say it here. Madison may have been wrong. He was proven wrong by members of this institution when he said that ambition would fight ambition. He believed that you all would be just jealous over your inherent authority, you would not let anyone take it away. But this institution has really shattered that assumption.

Senator PAUL. Certainly there is ambition. It is just misplaced. [Laughter.]

Judge NAPOLITANO. Maybe Madison meant courage, because the Congress has really lacked the courage. Those of you who are here today have the courage to say to the executive, “You have to stop.” I mean, the most frequently cited, at least until recently, Justice in American history, Benjamin Cardozo once said, “Where there is a wrong there is a remedy,” except when the President wages war and there is nobody who can get into court to challenge him. Professor Turley is living proof of that; he has had some unique successes. Congress has to write the legislation, whether it is on standing or whether it is no President shall engage in any act of violence, whether by people in uniform or not, except in accordance with Article I.

Senator PAUL. Right. It is easy for us to deflect and say, the court should allow standing and the court should fix this, when in reality we probably need to look in the mirror and aggressively use our ambition to take our power back.

We have talked about the delegation. We are giving up authority that was constitutionally given to us. I think there is a slightly separate issue that goes to constitutionality as well, and that is, changing something that can only happen by a positive affirmative vote of a majority to something that can only be stopped by a two-thirds vote of disapproval. I think is important to look at this, like on spending bills, Congress is supposed to spend bills. The President cannot spend any money unless a majority of us give him the money to spend. That is the way it goes. It has to be a majority. It would be like us saying to the President, “You can spend all of the money, and the only way we can stop you from spending the money would be by a two-thirds vote.” Who in the world would think that that was possibly constitutional?

But I guess my question is this: Would that be a separate constitutional issue from the idea of delegation of authority? Because what we are actually doing is switching something. The Constitution has certain things that are done by majority vote affirmatively, actually, almost everything is affirmative, but then there are some things that are supermajority. Are we not just changing the Constitution? It is unconstitutional because there was a change. It is not necessarily a delegation but actually a change in the mechanism of the way the Constitution works. Professor Turley.

Mr. TURLEY. It is certainly a change. The Constitution is quite clear. You need the authority of Congress to go to war. This proposal gives you a post hoc measure, which we all understand will never occur. It is going to be very hard to get a veto-proof majority to take the name of an accused terrorist group or nation off that

list. It is going to be virtually impossible to do that, but it does not even matter how you feel about the logistics or the likelihood. It is in direct contradiction of the Constitution, and it is a bizarre notion. As you said, if my two boys here came to me and said, "Look, instead of my asking for the credit card, just give me your credit card and you can stop me when you see expenses get too high."

Judge NAPOLITANO. Is that not what happens? [Laughter.]

Mr. TURLEY. I think we would look at them and go, "Well, that would not be a really smart idea."

What is weird about all this is that the Framers were right, that is, everything we are talking about right now proves that they were right. They were right about war. They were right about appropriations. They really did know about human nature in that sense.

Judge NAPOLITANO. Look, the imposition of the supermajority is profoundly unconstitutional. The question is getting a court to declare it as such, which is nearly impossible.

Senator PAUL. Or us grabbing it back. I have another question, but I have gone over time, and I wanted to see if Senator Peters had any—are you good?

The last question I wanted to bring us was something that Mr. Anders brought up, and I think this is an important point I had not thought of until I read his statement. One, it is a real problem that associated forces are sort of out there and the President will define what they are in the future and then we can only stop him with a two-thirds vote. But it is also an interesting question that you bring up that associated forces are not defined to be foreign enemies necessarily. It could be a domestic group that you do not like that could now be associated forces. You could see how, you really can imagine groups—we will not go into all the imaginings of which groups, but it could be domestic groups you could say are associated forces. Your point is that the indefinite detention of citizens that has been legalized through the previous defense authorizations could then be applied to vast groups of Americans.

Could you make that a little more clear for us and re-explain exactly what you mean by that?

Mr. ANDERS. Yes. This is a problem with the Corker-Kaine AUMF. It was a problem with the NDAA. It was a problem with the NDAA detention provisions. It was a problem that the Senate by vote refused to fix, despite the votes of people sitting on the dais who voted to protect American citizens there. But there is no prohibition in the Corker-Kaine AUMF from designating an American group, American citizens, or an American individual from being an associated force that the President could decide on his or her own is an enemy of the United States.

Similarly, there is no prohibition in the Corker-Kaine AUMF from designating the United States as a place where military force can be used.

Now, we take it for granted because of Posse Comitatus, which is probably more limited than the kind of legend around it makes it seem.

Senator PAUL. Posse Comitatus limits Federal officers from—or the Army from operating domestically?

Mr. ANDERS. That is right, for law enforcement purposes.

Senator PAUL. I guess one of the questions would be: Who is the Army and who is intelligence officers or homeland security police? Are they the Army? Are they limited by Posse Comitatus?

Mr. ANDERS. That is right. But in this instance, there is nothing in the Corker-Kaine AUMF that says that the United States cannot basically become a battlefield. This is something that came up during the debate around the detention provisions in 2011 with Senator Graham going to the Senate floor saying that the United States can be a battlefield.

This is a real problem. There have been United States citizens that have been droned accidentally, droned on purpose. As you know, Mr. Chairman, there have been United States citizens that have been put in indefinite military detention. These are not theoretical problems.

Now this is one aspect, of course, of far bigger problems with the Corker-Kaine AUMF, but this is one that I think, especially as we noticed there was kind of tucked in there with this innocuous name, just saying that these provisions of the NDAA are getting amended by adding the name of the new AUMF into it. It is a broad new authority that would be handed over to the military.

Senator PAUL. I know Judge Napolitano has a plane to catch. If you want to escape, we are going to let you escape. But I know Senator Sanders had a few more minutes of questions. I am going to leave that up to you whether you can stay or go.

Senator SANDERS. Very briefly, I apologize but I had a pre-scheduled meeting that I had to be in, and thank you very much for your excellent testimony.

Let me ask you this question, and you may well have gone over it when I was not in the room. When we talk about giving the President today virtually complete authority, if we read in the paper that the President decided to bomb someplace tomorrow, nobody would blink an eye, right? That is what we have seen for decades. You talk about the precedential impact of allowing Presidents to do this. What does that mean, above and beyond wars, above and beyond abrogating the Constitution of the United States, what does it mean to our quality of life in this country?

Judge NAPOLITANO. Oh, I think it is the fact that we are having this kind of a conversation about whether the President could kill Americans in America or whether the President can engage in perpetual war, no matter how noble he believes that cause is, speaks volumes about how low we have sunk with respect to culture, morality, and fidelity to first principles in the Constitution, Senator Sanders.

Senator SANDERS. OK.

Mr. TURLEY. I think that there is really a twofold problem here. One is that, Benjamin Franklin, as you, I am sure, recall, at the convention was asked by Mrs. Powell, "What was it that you have wrought? What have you created?"

Senator SANDERS. Is that really true, by the way? Did he really say that?

Mr. TURLEY. That is a fact that I do not want to check.

Senator SANDERS. Or is that fake news? I do not know.

Judge NAPOLITANO. Only Jonathan believes that actually happened.

Mr. TURLEY. He said, "It is a Republic if you can keep it." That is the problem with being in perpetual war, is that my boys have never lived in a country that has not been at war. Both of them have literally never spent a day of their lives when we have not been at war. It becomes a natural State. The example of that is one of the most chilling things I saw in my lifetime was when Eric Holder went to my alma mater law school to announce the kill policy of the Obama Administration, and said that the Administration was now asserting the right to kill an American citizen on the President's sole authority, without charge, without conviction, and that he believed that authority was inherent in Article II. Instead of having any objections, a roomful of leading law professors and judges applauded an Attorney General saying, "The President has the inherent right to kill any of you."

The reason this is dangerous is take a look at the OLC opinions that we talked about recently. In the OLC opinion, they argued the President had unilateral authority to go to war without the approval of Congress because of "the historical gloss" of past wars. What has happened is that this body, because it has acquiesced for so long, that is now being used as an interpretive tool—

Senator SANDERS. That is the precedent that they are using.

Mr. TURLEY. That is right.

Judge NAPOLITANO. Yes.

Mr. ANDERS. Senator Sanders, I was really struck by something you said earlier, which was to talk about kind of what this is like, what this is all about in reality as opposed to theory.

Senator SANDERS. Right.

Mr. ANDERS. I do think that one of the dynamics around this discussion about putting together a new AUMF is that this has become kind of a lawyer's game about law, right? It is like one big logic game. It is telling here, although I do not want to be off this panel, right? The three lawyers here on this panel, the one, literally one hearing in front of the Senate Foreign Relations Committee was two lawyers there. The earlier versions of this, which came out of some of the Lawfare blog writers and thinkers there, there were panels both in the House and the Senate earlier, there were all lawyers on those. A lot of it just gets tossed around as we have not done this in 17 years, so how do we rearrange the words on the page?

Senator SANDERS. Right.

Mr. ANDERS. One of the things that we have been trying to bring home to people in talking about the Corker-Kaine AUMF is without even going to new groups, it has Al-Shabaab and it has Somalia, right? I have a 16-year-old, too. Do I want my 16-year-old going to war against Al-Shabaab in Somalia? My son probably cannot find Somalia on a map, and probably very few people even in this room know who Al-Shabaab is. But this basically would be Congress. Now, that is not even like turning—what the President comes up with.

Senator SANDERS. Right.

Mr. ANDERS. This would be Congress saying the United States can go to war against Al-Shabaab in Somalia. That does not mean just sending a drone there, here and there. That means if we want to—if the President wants to send 200,000 troops there and go in

all-out house-to-house fighting, as we did in Afghanistan and Iraq, we could do that.

Senator SANDERS. All right. My time is expiring. Senator Paul, thank you very much for calling this hearing. I thought I would miss some of it, but what I heard was just really very important, and I want to thank all three of you for your efforts. Thanks for being here and thanks for all you are doing.

Senator PAUL. To put a human face on this, you asked the families of the four soldiers who died in Mali chasing a herdsman, should we have discussed whether we needed to chase that herdsman, what that herdsman's threat to our national security was? What kind of war is going on in Mali? We have had no hearings on a war in Mali. In fact, a prominent member of the Senate Armed Services Committee said, "Mali? I did not know we had 1,000 soldiers there." That is very worrisome that the people who are supposed to be informed, that are supposed to be debating whether our sons and daughters die in foreign wars are not even debating it at all. We have completely abdicated it. There is a bipartisan group of us who would like to grab that back, but I can tell you, we are in the minority.

We will finish with this last question. The majority of the Senate—and I think Senator Sanders would agree with me—actually do believe in unlimited Article II authority on both sides of the aisle, maybe more so on my side of the aisle, but even some on the other side of the aisle do believe that there is unlimited Article II authority. In fact, I have heard this said many times, the only check we have is the power of the purse. I say, "Well, that is one check, but that is not the"—we have a check on the initiation of war and then on the continuation through spending. But it is virtually impossible to stop funding when a war is over there, because people say, "Well, you are not going to fund our young men and women. You are not going to give them the arms to defend themselves. How can you do this?"

Even in Vietnam, which was so incredibly unpopular, I think there was finally a funding vote in committee. I think Senator Leahy was there, he tells the story about being there and voting, it was 1974 or almost 1975, by the time we had the courage in one committee to vote to stop funding.

My question, though, is: Is there any historical evidence that our Founders believed in unlimited Article II authority or that the declaration of war is just now an anachronism that our Founding Fathers did not find to be important? We will start with Judge Napolitano and work our way down.

Judge NAPOLITANO. That is a short answer. There is no evidence that the Founding Fathers believed in unlimited Article II authority, and there is an abundance of evidence, which Professor Turley characterized in his opening statement, that they did not.

Mr. TURLEY. Yes, there are plenty of systems that give that type of authority. It just does not happen to be ours. The Framers were quite clear to the contrary. This is one of the few areas where there was not much of a debate. In one case there was a single person who was suggesting this view, that a President should have this authority, and he did not get a second on his motion.



My preference is that if you want to gut Article I, Section 8, do it, but do not blame the Framers, and do not pretend that it is in compliance with the Constitution.

Mr. ANDERS. Madison has gotten a lot of attention today, so just to put out Thomas Jefferson, give him a little air time——

He wrote, “An allocation of war powers to Congress provides an effectual check to the dog of war by transferring the power of letting him loose from the executive to the legislative body.”

Senator PAUL. I think this has been a great hearing. Thanks, everyone, for coming. If we are still at war 17 years from now, if Kaine-Corker passes and there are no limits on war, let it be known that there were at least some of us who warned. Thank you.

Mr. ANDERS. Thank you.

Mr. TURLEY. Thank you.

Judge NAPOLITANO. Thank you, Senator.

[Whereupon, at 4:08 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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Opening Statement of Chairman Rand Paul, M.D.  
Federal Spending Oversight Subcommittee

*War Powers and the Effects of Unauthorized Military Engagements on Federal Spending*  
6/6/2018

For years now, critics have complained the global war on terror has never been authorized.

After the attacks of 9/11, President Bush did his Constitutional duty. He asked Congress to authorize war against the people who attacked us on 9/11 or anyone who harbored or aided and abetted those who attacked us.

If you read the authorization, it's actually very specific. Bush originally asked for more expansive language but Congress insisted on narrowing the mandate to use force against only those who either attacked us or planned the attack or harbored the attackers.

Force is authorized against un-named entities but they are narrowly defined by their relationship to the attacks of 9/11. Authorization was not given for a global war on "terror," or against radical Islamists or separatists or insurgents of various civil wars. Authorization was not given for "associated" forces.

Authorization was specific and solely to be directed against the people who attacked us on 9/11 or anyone who helped or harbored them. Period.

It is safe to say, that no one in Congress believed they were voting for a worldwide war on "terrorism" in twenty some odd countries that would go on for decades.

So, intellectually honest observers have for years now complained that the 9/11 authorization of war does not cover the wars being fought throughout dozens of countries in Africa, the Middle east, and the South Pacific.

So, basically the expansion of the "war on terrorism" really has occurred without the required Constitutional authorization.

Senators Corker, Kaine and others wish to rectify the lapse in Constitutional declaration of war by passing a new authorization for force.

I don't disparage their effort. Their motives are genuine. But really there are two big issues here that need to be fully debated.

Number one: Does it matter who wields the power to initiate war?

Our founding fathers believed strongly that it did. They squarely delegated the power to declare war to Congress. Madison put it this way: "The executive is the branch most prone to war, therefore, the Constitution, with studied care, gave the power to declare war to the legislature."

So, yes, it is the job of Congress to declare or initiate war and Congress has been negligent for over a decade now. Congress has not done its job. Congress has let President after President strip the war power from Congress and concentrate that power in the Executive.

The second and inseparable issue is: when and where should we be at war?

It is not enough to say Congress should authorize war. The bigger question is where and when should we fight. Our job is not just to put a Congressional imprimatur on war. The vast and important job of Congress is to decide when and where we go to war.

The debate that should ensue must ask: "Are we to authorize the status quo? Are we to authorize war in all of the theaters the President has taken us?"

Or, should Congress limit the scope of the worldwide wars we find ourselves involved in?

Here the Corker/Kaine authorization fails us. The Corker/Kaine Authorization does not limit the scope of war it merely codifies the status quo and I would argue actually expands the current theaters of war.

Corker/Kaine authorizes war against at least eight groups that are known to operate, all- together, in over 20 countries. Hardly sounds like we'll have any less war.

Equally concerning is that Corker/Kaine unconstitutionally delegates or transfers an enumerated power from Congress to the President.

Article 1 Section 8 gives Congress the sole power to declare war. Corker/Kaine initially authorizes war against eight groups but says to the President: "Hey, you get back to us and give us an initial list in case we missed anyone we are currently at war with. And, by the by, if you want to add any "associated forces" to the list, please send us a report.

So, this authorization transfers the power to name the enemy and its location from Congress to the President.

Worse yet, this authorization changes the nature of declaring war from a simple majority, affirmative vote to require a supermajority, veto-proof vote to disapprove of Presidential wars.

So, if the President defines a new "associated force" that our military will attack, the only way Congress can stop him is now a 2/3rds vote to overcome his veto.

The constitution is flipped on its head. This authorization fundamentally transfers the delegated power of war declaration from Congress to the President.

The hearing today is convened to explore precisely that question: Can Congress transfer the power to declare war to the President?

In that context, we will discuss the Constitutionality of the Corker/Kaine authorization for war. I hope we'll have a spirited discussion.

**U.S. Senate Homeland Security and Governmental Affairs Committee  
Subcommittee on Federal Spending Oversight and Emergency Management  
“War Powers and the Effects of Unauthorized Military Engagements on  
Federal Spending”**

**June 6, 2018**

**Senator Gary C. Peters, Ranking Member**

***Opening Statement***

Thank you, Mr. Chairman, for calling today’s hearing. I continue to be impressed with your willingness to have this Subcommittee tackle big issues, and no issue is bigger than War Powers.

Voting to send our sons and daughters to war is the most important, and the heaviest, responsibility that a member of Congress bears. We must never forget that while the sacrifice of war is borne by our servicemembers and their families, under Article I, Section 8 of the Constitution, the responsibility of asking for that sacrifice is ours.

And yet, today, our warfighters are serving in harm’s way in places that have never been named in any declaration of war and facing adversaries that cannot be found in any authorization of military force.

The Framers, in their wisdom, separated the power to declare war from the power to wage it. But, Mr. Chairman, as you have observed, the reality is that we are at war anywhere and anytime the President says so. In failing to assert our War Powers, we have effectively ceded them to the President.

Ceding war powers to the President is a way for us to play it safe. In avoiding a declaration of war, and in keeping force authorizations vague and malleable, we can blame the President when things go wrong.

But we must not shirk our Constitutional responsibility in favor of political expediency. We owe it to our servicemembers and their families to roll up our sleeves and have this debate.

This is not a partisan issue, nor is it new. Congress hasn’t declared war since World War II. President Obama did not seek congressional authorization for the use of military force in Libya, nor did President Trump seek congressional authorization for military action in Syria.

The 2001 Authorization of Use of Military Force against al-Qaeda has now been used by three Presidents to support combat in countries with no nexus to 9/11 and against organizations that

didn't even exist then. It offends common sense. That's why I supported Senator Paul's effort to repeal the 2001 and 2002 Authorizations for Use of Military Force.

The world has changed since we last declared war in 1942. Our adversaries often wear no uniform and swear allegiance to no nation. The technology of war has evolved in ways that would be unrecognizable to the Framers. Our military can impact world affairs in an instant with a drone strike directed remotely from inside the United States. How we authorize war must adapt to the changing threats and technologies.

But the principle of separation of powers that animated the drafters of the Constitution is a sound today as it was in 1789. The power to declare war and to authorize military force is Congress's most sacred responsibility. We must reclaim it.

I know that our witnesses have spent a lot of time considering these issues and I am eager to hear their views. I want to know more about the cost of Congressional inaction and ideas for reasserting our Constitutional authorities. I am heartened by the bipartisan engagement today and hopeful that we can find solutions together.

Thank you, and I yield back.

STATEMENT OF HON. ANDREW P. NAPOLITANO

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War and the Separation of Powers:  
War Powers and the Effects of Unauthorized  
Engagements on Federal Spending

Testimony before the Federal Spending Oversight Subcommittee  
of the Committee on Homeland Security and Governmental  
Affairs

United States Senate

June 6, 2018



It is an honor to appear before you today in this chamber. The issue before this body relates to a matter far more serious, and far more troubling than I would hope the Congress would ever need to confront. The fact that such legislation can even be considered by this Congress speaks volumes about the state of our Republic.

S.J. Res 59 of the 115th Congress threatens to extinguish the firewalls carefully erected by our Founders by delegating to the Executive Branch the power to make limitless war on a poorly defined enemy without any clear objective or end point. The separation of powers was designed, as James Madison reminds us in Federalist 51, with the belief that “[a]mbition must be made to counteract ambition.”<sup>1</sup>

Many American law schools begin classes in Constitutional Law by asking students what sets the U.S. Constitution apart

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<sup>1</sup> THE FEDERALIST NO. 51 (J. Madison).

from all others. Usually, students focus on free speech, privacy, and, perhaps, due process.

While each of these guarantees, when honored, proves vital to restraining government, they would falter without the separation of powers. The constitutions of many totalitarian countries pay lip service to free speech, privacy and even due process; but none has the strict separation of powers that we enjoy here in the United States.

Under our Constitution, you, and your Senate colleagues and your counterparts in the House of Representatives, write our laws. The president enforces them, and the courts interpret them; and those powers and functions may not constitutionally be mixed, exchanged, or traded.

The Congress also declares war. The president also wages war. The courts also invalidate the acts of the other two branches when they exceed their constitutional powers.

The Supreme Court has ruled that the separation of powers is integral to the Constitution not to preserve the prerogatives of each branch of government, but to divide governmental powers among the branches so as to keep power diffused — and thereby limited and thus protective of personal freedom.

James Madison, who wrote the Constitution and the Bill of Rights, wanted not only this diffusion by separation but also tension — even jealousy — among the branches so as to keep each in check. He believed that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, [self-appointed], or elective, may justly be pronounced the very definition of tyranny.”<sup>2</sup> And it was in the same essay that James Madison stated, referring to the separation of powers, that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”<sup>3</sup> As a legislator,

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<sup>2</sup> THE FEDERALIST NO. 47 (J. Madison).

<sup>3</sup> THE FEDERALIST NO. 47 (J. Madison).

Madison repeated, as quoted by Chief Justice William Howard Taft, that: “If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices.”<sup>4</sup>

Separation of powers weighed heavily on the minds of the Framers of the Constitution. Indeed, as my dear friend, the late Justice Antonin Scalia observed while he sat on the United States Court of Appeals for the District of Columbia Circuit, “no less than five of the Federalist Papers were devoted to the demonstration that the principle [of separation of powers] was adequately observed in the proposed constitution.”<sup>5</sup>

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<sup>4</sup> *Myers v. United States*, 272 U.S. 52, 116 (1926) (Taft, C.J) quoting 1 Annals of Cong. 581 (Statement of Rep. Madison).

<sup>5</sup> Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 881 (1983) (footnote omitted). See also, Felix Frankfurter and James M. Landis, *The Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts. A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012 (1924): the

The Framers never imagined that one branch of government would abdicate its authority and cede an essential power to another branch since such a giveaway would be unconstitutional. The Supreme Court has ruled that the core functions of each branch of the federal government may not be delegated away to either of the other two without violating the separation of powers.<sup>6</sup>

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doctrine of separation of powers “embodies cautions against tyranny in government through undue concentration of power.” *Id.* “The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind the ‘the separation of powers’ is fear of the absorption of one of the three branches of government by another.” *Id.* (footnote omitted). Justice Brandeis recognized the importance of the separation of powers. It “was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

<sup>6</sup> The Supreme Court observed:

We noted recently that “[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” *INS v. Chadha*, 462 U. S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to “diffus[e] power the better to secure liberty.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson’s words echo the famous warning of Montesquieu, quoted by James Madison in *The Federalist* No. 47, that “there can be no liberty where the legislative and executive powers are united in the same person,

I recount this not as a mini-constitutional law history lesson but rather because it serves as necessary background to address a real and contemporary problem. In mid-April of this year, on the basis of evidence so flimsy that his own secretary of defense questioned it — and without any legal or constitutional authority — President Donald Trump dispatched 110 missiles to bomb certain military and civilian targets in Syria, where the President argued the Syrian government manufactured, stored, or used chemical weapons.

President Trump did not appeal to you for a declaration of war, nor did he comply with the U.N. Charter, a treaty to which

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or body of magistrates'...." The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

*Bowsher v. Synar*, 478 U.S. 714, 721-722 (1986) (Burger, C.J.).

When the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly "delegates" legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power.

*Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas J. concurring). "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York* 524 U.S. 417, 449 (1998) (Kennedy, J. concurring). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Id.* at 450.

both the U.S. and Syria are signatories. Though he did not articulate any statutory basis for his use of our military, his predecessors often based their unconstitutional uses of military force two statutes — one enacted in 2001 and the other in 2002, each known as the Authorization for Use of Military Force, or AUMF.

The AUMFs refer to either the Taliban or al-Qaida or their affiliated forces in Afghanistan or Iraq as targets, or to pursuing those who caused the attacks in America on 9/11 or those who harbor weapons of mass destruction. They are grievously outdated and inapplicable today.

Can a president legally use military force to attack a foreign land without a serious threat or legal obligation or a declaration of war from Congress? In a word: No. The President has never had that authority.

The Constitution is clear that only Congress can declare war,<sup>7</sup> and only the president can wage it. Federal law and international treaties provide that — short of defending the country against an actual attack — without a congressional declaration of war, the president can only constitutionally use military force to repel an enemy whose attack on America is imminent or to defend U.S. citizens and property in foreign lands from foreign attack or in aid of an ally pursuant to a treaty with that ally.

In the case of the President's bombing of Syria in April, none of those conditions was met.

Prior to the strike on Syria — but no doubt prodded by the prospect of it — a bipartisan group of your Senate colleagues offered legislation supported by the President that you are considering today. If enacted it would rescind both anachronistic AUMFs, which possess no useful moral or legal authority, in favor

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<sup>7</sup> Congress shall have the power to “to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. Const. art. I, § 8, cl. 11.



of an unconstitutional mishmash that would permit a president to strike whomever and wherever he pleases. The president would be restrained only by a vote of Congress — after hostilities have commenced.

The legislation under scrutiny today would give the president far more powers than he has now, would directly violate Congress' war-making powers by ceding them away to the president, would defy the Supreme Court on the unconstitutionality of giving away core governmental functions, would commit the U.S. to foreign wars without congressional and thus popular support, and would invite dangerous mischief by any president wanting to attack any enemy — real or imagined, old or new — for foreign or domestic political purposes, whether American interests are at stake or not.

Speaking of the Supreme Court's approval of internment of Japanese-Americans during World War II, Justice Robert Jackson warned that such approval by the Court of expansive executive authority "lies about like a loaded weapon ready for the hand of

any authority that can bring forward a plausible claim of an urgent need.”<sup>8</sup>

The proponents of this legislation will argue that Congress would retain its war-making powers by its ability to restrain the president through some future action. That is a naive contention because congressional restraint, which can come only in the form of prohibitory legislation or withdrawal of funds, would certainly be met by a presidential veto — and a veto can be overridden only by a two-thirds vote of both the House and the Senate.

The Constitution, written in war’s aftermath, strictly limits war’s offensive use only to when the people’s representatives in Congress have recognized a broad national consensus behind it. John Quincy Adams, in his July 4, 1821 address, cautioned that America “goes not abroad, in search of monsters to destroy.”

I could go on to explain the significance of the placement of the war power in the hands of Congress. I could also speak to the

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<sup>8</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

violations of our civil liberties and natural rights at the hands of the executive in times of war. However, 225 years ago, James Madison foresaw these dangers. Between 1793 and 1794, James Madison and Alexander Hamilton debated the roles of the executive and legislative branches after President George Washington had declared that the United States would remain neutral in the war between Revolutionary France and Great Britain. James Madison delivered an explanation of the importance the war power as congressional prerogative as elegant and precise as the Constitution itself.

He wrote this a scant ten years after the formal conclusion of the American Revolution. At that time, Congress met in Congress Hall in Philadelphia. John Jay still presided as Chief Justice of the Supreme Court, which also met in Philadelphia. Though our Republic remained in its infancy, James Madison understood the risks that wars presented to the United States. He wrote:

In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive

department. Beside the objection to such a mixture to heterogeneous powers, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.<sup>9</sup>

Thank you, for the opportunity to speak with you today. I

look forward to your questions.

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<sup>9</sup> James Madison, Helvidius No. 4 in LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793 BY ALEXANDER HAMILTON (PACIFICUS) AND JAMES MADISON (HELVIDIUS) TO WHICH IS PREFIXED THE PROCLAMATION 89 (J and G.S. Gideon ed. 1845).

**Written Statement**

**Jonathan Turley,  
Shapiro Professor of Public Interest Law  
The George Washington University**

**“War Powers and the Effects of  
Unauthorized Military Engagements on Federal Spending”**

**Committee on Homeland Security and Governmental Affairs  
Subcommittee on Federal Spending Oversight and Emergency  
Management**

**United States Senate**

Dirksen Senate Office Building SD-342

June 6, 2018

**I. INTRODUCTION**

Chairman Paul, Ranking Member Peters, and members of the Subcommittee, my name is Jonathan Turley and I am a law professor at The George Washington University, where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is a distinct honor to appear before you today to discuss one of the most important powers contained in our Constitution: the declaration of war by the Legislative Branch.

I come to this question as both an academic and a litigator in the field. My past writings address the separation of powers, war powers, and the military.<sup>1</sup> I am also the former lead counsel for both Democratic and

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<sup>1</sup> See, e.g., Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305 (2015); Jonathan Turley, *A Fox in the Hedges: Vermeule's Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517 (2015); Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523 (2013); Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013); see also Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965 (2013); Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance, 71 George Washington Law Review 1-90 (2003); The

Republican members in challenging the undeclared war in Libya under the Obama Administration. My prior litigation also includes representing the United States House of Representatives in its successful challenge to the unauthorized use of federal funds in Obamacare. I am admittedly an unrepentant Madisonian scholar and, as such, I tend to favor a robust and active role for Congress. I have previously testified against the encroachment of the Executive Branch and the growing imbalance in our tripartite system of governance. The rise of an uber presidency has threatened the stability of our system. Much of this imbalance is due to the acquiescence of Congress in yielding greater and greater authority to the Chief Executive. The legislation under consideration today is one of the most chilling examples of this acquiescence and the danger that it presents for future generations.

There can be no weightier issue for Congress than the conditions under which this nation goes to war. The costs of such decisions are real, immediate, and often catastrophic for many families. If there is a sacred article in the Constitution, it is Article One, Section Eight. It is not merely a constitutional but a moral responsibility. Indeed, the words "Congress shall have power to ... declare War," fails to capture the moral imperative. It is not simply a power but rather an obligation that was meant to adhere to every member upon taking the office of office. Unfortunately, from the earliest stages of our Republic, members have struggled to avoid the responsibility for declarations of war. Regrettably, the new Authorization for the Use of Military Force, S.J. Res. 59, is the inevitable result of this long history of avoidance. Despite some improvements, the thrust of the proposed legislation is to give members a statutory shield from their constitutional obligations over war making.

The new AUMF amounts to a statutory revision of one of the most defining elements of the United States Constitution. Putting aside the constitutionality of such a change absent a formal amendment, the proposed legislation completes a long history of this body abdicating its core responsibilities over the declaration of war. Indeed, Columbia Professor Matthew Waxman recently offered what appears to be a collective shrug to the obvious negation of the original design and intent of the Framers. In speaking of the lack of a finite period of authorization in this legislation,

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Military Pocket Republic, 97 Northwestern University Law Review 1-134 (2002); Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy, 70 George Washington Law Review 649-769 (2002).

Waxman observed that “We’ll be engaged in an indefinite war either way.”<sup>2</sup> If anything Waxman was understated. We are engaged in indefinite, *undeclared* war – the very menace that the Framers sought to prevent with express constitutional language requiring congressional declarations of war. We find ourselves at this ignoble point not by accident but through decades of concerted effort by Congress to evade the responsibility for the most important decisions committed to it by the Framers. Yet, due to the artificially narrow standing rules created by the federal courts, the unconstitutionality of such a change may never be subjected to judicial review.<sup>3</sup> Thus, this legislation could prove not only unconstitutional but unreviewable – an absurd position that would have mortified the Framers. What we will be left with is indefinite undeclared war.

As discussed below, the new legislation would discard not just the obligation to declare wars but even the obligation to secure prior authorization for specific wars. If Congress implements this new system, Article I, Section 8 will be left as little more than a husk of its original

<sup>2</sup> *Congress Wrestles With New War On Terror Authorization*, NBC News, April 16, 2018.

<sup>3</sup> I have previously testified on the impact of narrow (and in my view unwarranted) standing rules that often place glaring unconstitutional acts beyond the reach of judicial review. See, e.g., United States House of Representatives, House Committee on Science, Space, and Technology, “*Affirming Congress’ Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*,” September 14, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*Examining The Allegations of Misconduct of IRS Commissioner John Koskinen*” June 22, 2016; United States Senate, Committee on Homeland Security and Governmental Affairs, “*The Administrative State: An Examination of Federal Rulemaking*,” April 20, 2016; United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, “*The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies*,” March 15, 2016; United States Senate, *Confirmation Hearing For Attorney General Nominee Loretta Lynch*, United States Senate Committee on the Judiciary, January 29, 2015; United States House of Representatives, “*Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of The United States*” Before the H. Comm. On Rules, 113<sup>th</sup> Cong., July 16, 2014; United States House of Representatives, “*Enforcing the President’s Constitutional Duty to Faithfully Execute the Laws*” Before the H. Comm. on the Judiciary, 113<sup>th</sup> Cong., February 26, 2014; United States House of Representatives, *The President’s Constitutional Duty to Faithfully Execute the Laws Before the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong., December 2, 2013; United States House of Representatives, Committee on the Judiciary, “*Executive Overreach: The President’s Unprecedented “Recess” Appointments*,” February 15, 2012.

design. Worse yet, the country will be left with a constitutional provision that gives citizens a false assurance of a check on war powers. The provision speaks loudly and clearly to Congress. However, the new AUMF would reduce it to what Macbeth described as voices “full of sound and fury, Signifying nothing.”<sup>4</sup>

## II. A Brief Historical Overview

In both the constitutional and ratifying conventions, the Framers carried out passionate and detailed debates over the role of the “Chief Magistrate,” including whether the presidency should actually be a committee of three to avoid the concentration of powers in the hands of one person. The overwhelming sentiment was that a president could not be trusted with the sole authority to go to war. That was evident at the Constitutional Convention when Pierce Butler proposed “vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it.”<sup>5</sup> He did not even receive a second to the motion.

The deep suspicion over the role of chief executive was captured in the warning of Edmund Randolph that the creation of a single executive would be the very “foetus of monarchy.”<sup>6</sup> The compromise for such delegates was to deny the president certain powers like the power of the purse or the unilateral appointments of senior officials. However, the most prominent concern was the ability of a president to commit the country to war. This led to one of the most defining provisions of the Madisonian system: to leave the decision to go to war with Congress rather than the president. After framers like James Wilson voiced fears of an elected monarch, their colleagues responded by denying the president the power most associated with absolute rulers in the declaration of war. In the Pennsylvania Ratifying Convention, Wilson assured his colleagues that the greatest danger of a chief executive had been blunted through the declaration requirement:

“This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body

<sup>4</sup> WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5 (Barbara A. Mowat & Paul Werstine eds. 1992)

<sup>5</sup> 2 The Records of the Federal Convention of 1787 318-19 (Max Farrand ed., rev. ed. 1966).

<sup>6</sup> 1 The Records of the Federal Convention of 1787 65-66 (Max Farrand ed., rev. ed. 1966).



of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our interest can draw us into war.”<sup>7</sup>

The framers saw presidents as the most likely to engage in foreign military excursions. James Madison said it most succinctly in a letter to Jefferson: “The constitution supposes, what the History of all ... [Governments] demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”<sup>8</sup> This key division of authority was celebrated as the solution to the intractable problem of the predisposition of chief executives toward war. Wilson proclaimed that “this system will not hurry us into war ... It will not be in the power of a single man ... to involve us in such distress . . .” Jefferson stated in a letter to Madison that the Framers had achieved an “effectual check to the Dog of war.”<sup>9</sup> Even Alexander Hamilton, an advocate for a strong chief executive, heralded the key limitation on presidents in Federalist #69, stating that a president

“would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the declaring of war, and to the raising and regulating of fleets and armies; all which by the constitution under consideration would appertain to the Legislature.”<sup>10</sup>

What is most striking about these and other accounts is that the Framers believed that Article I, Section 8 was one of the greatest triumphs of the convention where they had established clear and undeniable obligations for Congress. As Madison proclaimed in 1793, “the simple, the received and

<sup>7</sup> 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 528 (1836).

<sup>8</sup> Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 *The Writings of James Madison* 311, 312 (Gaillard Hunt ed., 1906).

<sup>9</sup> Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Julian P. Boyd, ed, 15 *The Papers of Thomas Jefferson* 392, 397 (Princeton 1958).

<sup>10</sup> THE FEDERALIST No. 69, *supra*, at 448 (Alexander Hamilton)

the fundamental doctrine of the constitution, that the power to declare war ... is fully and exclusively vested in the legislature; that the executive has no right, in any case to decide the question, whether there is or is not cause for declaring war ....”<sup>11</sup>

These assumptions were quickly undone by the political impulse of members to avoid responsibility over costly and unpredictable wars. The compromise would become a rule honored almost exclusively in the breach. In our roughly 250-year history, our country has been in dozens of large-scale military campaigns or wars. Yet, Congress has “declared war” only five times - the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. There have been a total of eleven declarations issued against different countries in the five declared wars. Political convenience has trumped constitutional principle.

We did not even make it out of the eighteenth century before Congress found an alternative to a declaration. In 1798, it passed *An Act Further To Protect The Commerce of the United States*, which was then used by John Adams to launch the Quasi-War with France. That legislation would be a harbinger of the gradual erasure of the declaration provision. Faced with the seizure of ships and other acts of war, Congress decided to pass a generally worded measure “more effectually to protect the Commerce and Coasts of the United States,” which authorized the President to instruct military commanders to act against any “armed vessel” committing “depredations on the vessels” belonging to United States citizens.<sup>12</sup> It further authorized the retaking of seized ships and later was amended to allow commanders to “subdue, seize and take any armed French vessel which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas . . .”<sup>13</sup> The legislation authorized acts of war without formally declaring one, though this would be far more specific than later resolutions. This practice allows members a degree of political cover in passing legislation ostensibly to protect things like shipping while really giving a president the right to wage war. Not only did Congress fail to adhere to the language of the Constitution but the Supreme Court also failed to maintain the clear lines of the Constitution in requiring a declaration. Once Congress was allowed to avoid responsibility for a declaration, this

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<sup>11</sup> JAMES MADISON, *Letters of Helvidius* (Aug.-Sept. 1793), in 6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

<sup>12</sup> An Act More Effectively To Protect The Commerce and Coasts of the United States, ch. 48, 1 Stat. 561 (1798).

<sup>13</sup> *Id.*

approach yielded more and more generally worded authorizations that gave members plausible deniability if wars went badly.

In 1812, James Madison, as president, went to Congress to demand that members carry out their express obligations under Article I. He reminded Congress that declarations are not simply a bulwark against the concentration of power in the hands of a single person. They are a vital declaration of a free people before taking the most extreme measure as a nation:

“Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of Events ... is a solemn question which the Constitution wisely confides to the legislative department of the Government. In recommending it to their early deliberations I am happy in the assurance that the decision will be worthy the enlightened and patriotic councils of a virtuous, a free, and a powerful nation.”<sup>14</sup>

A declaration therefore serves to rally a nation to speak as one in a clear and informed voice. Such collective judgments are not always easy to secure. They were not supposed to be. The Framers largely abhorred war and its costs. They wanted to make it difficult by imposing an obligatory condition on Congress. A nation needs clarity and consensus before unleashing, as Jefferson puts, the “dogs of war.”

Yet, it is precisely that clarity and burden that politicians abhor. It comes at a cost that has become easier and easier to evade. Our last declaration of war was in 1942. Since that time, we have engaged in open warfare in dozens of countries with hundreds of major military operations. Presidents now have precisely the authority that the Framers sought to deny them under the express language of our Constitution. Our current use of AUMFs flies in the face of both the language and intent of the Framers. Indeed, it makes a mockery of the statement of George Washington in 1793 that “The Constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after

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<sup>14</sup> James Madison, Message to the Senate and House of Representatives (June 1, 1812), in 2 *A Compilation of the Messages and Papers of the Presidents* 484, 489-90 (James D. Richardson ed., 1897)

they have deliberated upon the subject and authorized such a measure.”<sup>15</sup>  
 On a weekly basis, we see “offensive expedition[s] of importance”  
 undertaken under the ambiguous authorizations of Congress.

### III. THE AUMF, CONSTITUTIONAL AVOIDANCE, AND THE CONSTRUCTIVE REPEAL OF ARTICLE ONE, SECTION EIGHT

The path to our current state of indefinite war was a long but straight progression from a requirement of a clear declaration to open-ended AUMFs. This path took the country through the infamous Gulf of Tonkin incident on August 4, 1964 – an alleged attack on the USS Maddox that became the pretext for the Vietnam War. If Congress believed that the attack was genuine, it was an act of war but again members did not want to take the responsibility for a formal declaration. Instead, it passed a resolution on August 7, 1964, stating “Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” It was a flagrant circumvention of the Constitution by members of this institution that would cost the lives of tens of thousands of American military personnel and ultimately shatter the lives of millions. Nevertheless, it was the political costs that Congress sought to avoid and members simply externalized the real and tragic costs to families throughout this nation.

After allowing this nation to go into an undeclared war of dubious origins, Congress was faced with a backlash from the public. It then became popular to limit authority. However, rather than default back to the express language of the Constitution, Congress passed the War Powers Act.<sup>16</sup> The

<sup>15</sup> Letter from President George Washington to Gov. William Moultrie (Aug. 28, 1793), in 33 The Writings of George Washington 73, 73 (John C. Fitzpatrick ed., 1940).

<sup>16</sup> The continued failure of self-professed textualists in Congress to follow the language of Article I, Section 8 remains a long-standing glaring and troublesome conflict. I have written about this disconnect for years. See Jonathan Turley, *How Presidents Start Wars*, Military History Magazine (Cover feature story), July/August 2007, at 1; see also Jonathan Turley, *Textualists and Originalists Are Again AWOL in Wars on Syria and Yemen*, The Hill, April 1, 2017; Jonathan Turley, *War – What it is Good For*, USA Today, February 15, 2007, at 13A; Jonathan Turley, *Can Congress Stop the War?*, USA Today, January 18, 2007, at 13A; Jonathan Turley, *A Check on Wartime Power*, The National Law Journal, March 7, 2005, at 34; Jonathan Turley, *A War Powers Quandary*, The Los Angeles Times, December 21, 2001, at A19; Jonathan Turley, *Cries of “War” Stumble Over the Law*, The Los Angeles Times, Sept. 13, 2001, at A21.

Act allowed a President to use U.S. forces in combat in the event of “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” However, it required the Executive Branch to report to Congress within 48 hours of such a military action, and required Congress to approve or reject the military action. Notably, such approval reflects an ongoing military campaign. Yet, Congress would not require prior approval or a formal declaration. Nevertheless, the resolution was an effort to require congressional involvement. It was a sad reflection of how far Congress had pushed itself into institutional obsolescence. It was passing a resolution to try to remain relevant to war making.

Passed on September 14, 2001, the AUMF continues this ignoble record in authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” While some of us opposed the language as wildly ambiguous and an effective blank check of undeclared wars, members eagerly passed it. It notably went as far as to approve “all necessary force” with no termination date. Not surprisingly, it was then used to launch extended military operations in Afghanistan, Pakistan, Yemen, Somalia, Syria, Iraq, and Libya. This included ground forces, drone strikes, and the detention of thousands, including the establishment of the detention center at Guantanamo Bay. It allowed the targeting of groups loosely defined as connected to Al Qaeda, including ISIL and other groups that have attacked Al Qaeda and its allies. According to the Congressional Research Service, this broad authority has been used 37 times in 14 countries for acts of war.

The 2001 AUMF embodies the key motivations behind the circumvention of Article I. First, it avoids the personal accountability for members to declare war and, second, it allows plausible deniability after wars go wrong. After it was shown that the Bush Administration had launched the war in Iraq on false representations of weapons of mass destruction, various members (particularly presidential candidates) blamed the Administration for the war and its costs. They cited the general language and insisted that they never intended a war with these costs and duration.

The new AUMF reflects many of these same flaws while adding new and disturbing elements. Admittedly, some of the flaws in this legislation existed in some form in prior AUMF. The new measure would repeal the 2002 AUMF and partially repeal the 2001 AUMF. However, a number of

prior flaws – and new flaws – are evident in the new legislation, which would not materially alter the scope or unilateral character of current military campaigns. Indeed, it could make it far, far worse.

Before addressing some of these inherent dangers, it is important to make a threshold objection to this and prior AUMF debates. There is a certain path dependence that is evident in war powers debates. After decades of open-ended resolutions, it is easy to confine the debate to simply one of scope and standards rather than the original threshold constitutional question. However, the original question remains. The Constitution allows ample leeway for presidents to respond to attacks on this country. A president has never been denied the right to respond to imminent attacks on the United States. Absent such an imminent threat, the Constitution requires a declaration of war. That requires a Congress to identify the enemy and the reason for going to war. Many insist that the realities of modern war simply do not allow for such clear determinations. In other words, we need to be in continual war in too many places to seek individual authorizations. Yet, the modern history of war making in the United States only shows the wisdom of the Framers. Since breaking away from the clarity of Article I, we have found ourselves in endless war where the targets are not even widely known by the public. The United States is now at war in places like Yemen and Somalia where we are simply seeking to degrade military capabilities of terrorist groups as opposed to responding to a specific threat against the United States.

If we did not have an AUMF, it is indeed possible that we would not have the range of military operations that we have today. We have never had that debate. As a result, citizens have no idea of the full range of countries where we are currently engaged in combat. We no longer require presidents to make that case and no longer require members to assume that responsibility. The assumption that AUMFs are now essential components to modern governance is hardly self-evident but, more importantly, it is inconsistent with the express language of our Constitution.

For civil libertarians, the most glaring element to this debate is that the long failure of Congress to assert its constitutional authority has led the Executive Branch to claim a type of expanded authority by default. The Office of Legal Counsel of the Department of Justice (OLC) previously advised President Obama that he had the authority to attack Libya without either an imminent threat to the United States or express authority from Congress. It argued that Article I could now be interpreted through a “historical gloss” of past unilateral military actions and the absence of congressional opposition. A second OLC memorandum issued on May 31,

2018 built on this “historical gloss” and said that President Donald Trump could also launch attacks on Syria without involving Congress. These opinions seek to make congressional acquiescence into a critical element of constitutional interpretation.

With that threshold reservation, I would like to address what I consider the most serious flaws in the current legislation.<sup>17</sup>

#### A. “New Foreign Countries”

The new legislation uses rather opaque means to convey authority to continue military operations against various states – wars that have never been fully debated, let alone declared, by Congress. Buried in the legislation is the following definition in Section 5 (c) that works as an effective authorization:

“In this resolution, the term “new foreign country” means a foreign country other than Afghanistan, Iraq, Syria, Somalia, Yemen, or Libya not previously reported to Congress pursuant to this paragraph.”

Accordingly, we will “by definition” still be at war in these countries without the President having to come to Congress to make the case for wars in six foreign countries. Members can authorize large-scale ground, air, and naval operations through this innocuous section. We have gone from a required vote of declaration to the adoption of a definition.

As for truly new countries, we have yet again a post hoc process for inclusion:

“NEW FOREIGN COUNTRIES.—Not later than 48 hours after the use of military force in a new foreign country pursuant to this joint resolution, the President shall submit an updated report required by

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<sup>17</sup> My testimony focuses on the separation of powers issues and Article 1, Section 8 implications of the new AUMF. There are, however, additional serious flaws in the legislation, including the potential for tremendous abuse in the detention of both citizens and non-citizens. Section 10, entitled “Conforming Amendment,” would by effect expand the scope of the National Defense Authorization Act for Fiscal Year 2012 (NDAA). This includes the NDAA’s controversial indefinite detention provision. There is a real question as to whether the sweeping language of this AUMF in combination if the NDAA could be used to hold citizens indefinitely, though such an abuse would hopefully trigger a challenge in the courts.

this paragraph and consult with the appropriate congressional committees and leadership. Authorization for use of military force pursuant to this joint resolution in a new foreign country is contingent upon the reporting to Congress pursuant to this paragraph.”

Congress is again left with the option of a joint resolution countermanding the inclusion of a new country. This, however, is less than what the Framers gave Congress: the right (and obligation) to affirmatively approve such wars. Congress *may* act on a question that it is required to act on under Article I, Section 8. That is not a codification but a substitution with less power and responsibility for members.

#### **B. “Associated Forces”**

One of the greatest concerns after 9-11 has been the apparent license given to the United States to attack groups anywhere in the world under the loosely defined conditions of prior AUMFs. The new legislation would leave in place the authorization of “necessary and appropriate force” against certain non-state groups and departs from the past open-ended authorization for war against “nations” deemed to be harboring targeted groups. Under the new authorization, targeted groups would not include a “sovereign state.” The specificity however is illusory. For example, a president can include new “associated forces” as well as new countries unless Congress passes a bill to specifically prevent it. The bill essentially places a specific list of authorized targets in a sea of ambiguity. Take Section Five. It appears to offer a concrete list of designated forces including (a) Al Qaeda in the Arabian Peninsula, (b) Al Shabaab, (c) Al Qaeda in Syria (including Al Nusra Front), (d) the Haqqani Network, and (e) Al Qaeda in the Islamic Mahgreb (AQIM). That would seem to correct the endlessly expanding list of groups under the prior AUMFs. However, the Congress would then add the following:

“(2) DESIGNATION.—Not later than 30 calendar days after the date of the enactment of this joint resolution, the President shall designate all organizations, persons, or forces other than those listed in paragraph (1) that the President has determined are associated forces covered by the authorization for use of military force provided by section 3(a) of this joint resolution by submitting to the appropriate congressional committees and leadership a report listing all such associated forces.”



Thus, the list constitutes only the initial designations on a list to be supplemented unilaterally by the President. What is curious is that the window for the initial expansion is just 30 days after enactment. Why? Rather than demand a full initial list to be submitted, the law allows a shorter list to be voted on with the ability to then expand the list after the matter is removed from the public debate. However, that is not nearly as worrisome as what follows:

“(3) NEW ASSOCIATED FORCE.—Not later than 48 hours after the President determines that a new organization, person, or force is an associated force covered by the authorization for use of military force provided by section 3(a) of this joint resolution, the President shall designate such organization, person, or force as an associated force by submitting a report to the appropriate congressional committees and leadership.”

Thus, the initial listing is largely irrelevant as a guarantee of specific authorizations. It leaves the appearance of specific authorizations but then allows the President to unilaterally add new groups to the list. As discussed below, this misleading structure is then coupled to an ex post provision allowing for congressional action if they disagree with the President. Given the ever changing movement of these groups, the initial list is likely to be meaningless. Moreover, past administrations have shown little restraint in adding groups to the list of targets under the most tangential connections to stated AUMF conditions. This law removes the need for pretense in past efforts to tie groups to Al Qaeda or other authorized targets. The President may simply add the groups to the list knowing that few politicians will have the temerity to question the inclusion of an alleged terrorist group.

The proposed AUMF codifies the rule that it is better to ask for forgiveness than permission. It is highly unlikely that politicians will vote to specifically remove the name of an alleged terrorist group from an authorization list. Even without adding new foreign states to the list, the AUMF still allows for attacks on foreign territory of “associated forces” located within those countries. Under international law, such attacks committed with the approval of a sovereign nation is considered an act of war absent narrow exceptions. The protections therefore are practically meaningless. Congress and the White House have previously shown a disinclination to declare wars against other nations in favor of basing attacks on groups within the territory of those nations.

### C. The Shift From Ex Ante To Ex Post Action

The most disturbing element in the new AUMF is the authority of a president to add new targets or expand the scope of the AUMF at his sole discretion – requiring Congress to pass a bill later if it wants to preserve the original scope passed in the AUMF. It is the final abandonment of the structure expressly set into place in the Constitution by the Framers. The Congress first abandoned the express requirement of a declaration of war. It then abandoned the need for specific authorizations of force in favor of broad categories of possible enemies. Now it is dispensing with the need for any prior authorizations to attack specific targets. The constitutional requirement for a declaration would be substituted with a requirement that a president inform Congress after the fact:

“(B) NEW FOREIGN COUNTRIES.—Not later than 48 hours after the use of military force in a new foreign country pursuant to this joint resolution, the President shall submit an updated report required by this paragraph and consult with the appropriate congressional committees and leadership. Authorization for use of military force pursuant to this joint resolution in a new foreign country is contingent upon the reporting to Congress pursuant to this paragraph.”

Members are fully aware that, even if a majority of members could be found to oppose a war in another country, it is highly unlikely that they could muster a veto-proof majority. The Corker-Kaine proposal achieves the long-sought goal of members to remove themselves from responsibility over war. These belated votes allow for members to register what are effectively symbolic votes while being able to claim that they had little real voice – or responsibility – in a war that goes badly. It would not only constructively repeal the War Powers Resolution but also Article I, Section 8. In so doing, it allows for endless war and zero accountability.

This adoption of an ex post role for Congress is made all the more serious by realities of modern budget practices. It is now routine for Congress to approve billions of largely unrestricted funds (beyond broad purposes of defense) to the Defense Department and other agencies. Indeed, when I represented both Democratic and Republican members challenging the Libyan War, we showed how the Administration funded an entire military campaign by shifting billions in money and equipment without the need to ask Congress for a dollar. It was a war essentially funded from loose

change owing to the failure of Congress to fully carry out its constitutional duties over appropriations. President Obama not only said that he alone would define what constitutes a war but unilaterally funded the war as just another discretionary expense. Federal appropriations have become so fluid and discretionary spending so lax that presidents are now more insulated than ever before from the threat of de-funding. Thus, Congress combined a failure to shoulder its duties over the declaration of war with a failure to shoulder its burden over appropriations. It has given presidents both a blank check to launch wars with an actual blank check to fund them.

Clearly, the power of the purse can still be used effectively as a check on the Executive Branch if Congress were to be inclined to exercise its inherent authority. Congress needs to be more specific on the use of funds and reduce the degree to which funds are given for discretionary uses, particularly during periods of circumvention and tension. However, the historic failure to exercise greater control over appropriations only magnifies the dangers over the failure to exercise control over war making. Indeed it may be inaccurate to call this a “blank check.” Checks usually state the purpose and require some verification. This is more like constitutional cash.

#### **D. Lack of A Sunset Provision**

The new AUMF would also dispense with even the need to reauthorize these sweeping powers. Indeed, members would succeed in this legislation from having to take any vote at all – a total abandonment of the role expressly dictated in Article I. Section 4 states:

“(a) PRESIDENTIAL SUBMISSION.—On January 20, 2022, and again every 4 years thereafter, the President shall submit to Congress a report regarding the use of military force pursuant to this joint resolution, which shall include a proposal to repeal, modify, or leave in place this joint resolution.

(b) EXPEDITED CONGRESSIONAL RECONSIDERATION.—During the 60-calendar day period beginning on January 20, 2022, and again every 4 years thereafter, a qualifying resolution to repeal or modify this joint resolution shall be entitled to expedited consideration pursuant to section 9 of this joint resolution.”

Thus, rather than simply placing a sunset date that requires affirmative congressional approval, the legislation would allow for literally endless wars without congressional action. The onus would be on the President every

four years to seek changes that he or she would prefer. Otherwise, the Congress is relegated to the right to act every four years or during the 60-day period starting on January 20, 2022. The new legislation would literally put our endless war on autopilot. It is final proof that Madison may have been wrong in his faith that members would fight jealously to protect their constitutional authority. While Madison hoped in *Federalist No. 51* that “ambition must . . . counteract ambition,” members have shown little institutional fidelity as they worked toward their own institutional obsolescence.

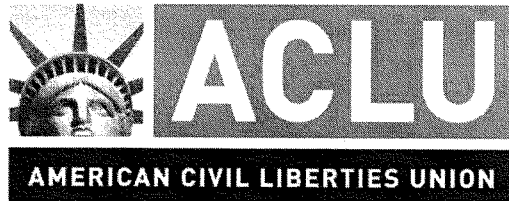
#### IV. CONCLUSION

The new AUMF would codify the long-sought desire of Congress to be a mere pedestrian to the prosecution of wars by the United States. Rather than seek to amend the Constitution to affirmatively surrender its institutional authority, members are constructively rewriting Article I, Section 8 in a more user-friendly form that does not require express declarations or even reauthorizations. It would combine this abdication of authority with its long-standing failure to limit the use of appropriated funds. This blank check therefore will have not only an unstated purpose but an unstated amount. Under those conditions, we have already had roughly 17 years of war and could just as well have 170 more.

I have had the honor of testifying many times in both houses of Congress. Today, however, I took two of my four children out of school to come to this hearing. My sons Aidan and Jack are sitting behind me. I felt that they should be here to watch part of this process because they could well be asked to pay the ultimate price for wars started under this sweeping authority. If called, I know that they would do their duty as did their grandfather, great grandfather, and prior generations of our family in our wars. The question is whether members of this body will do their duty as laid out in our Constitution and reject this proposed AUMF.

I thank you again for the honor of appearing today and I am happy to answer any questions that you might have.

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**STATEMENT OF**  
**CHRISTOPHER ANDERS**  
**DEPUTY DIRECTOR, WASHINGTON LEGISLATIVE OFFICE**  
**AMERICAN CIVIL LIBERTIES UNION**

For a Hearing on:

**“War Powers and the Effects of Unauthorized Military Engagements  
on Federal Spending”**

Before

**United States Senate**  
**Committee on Homeland Security and Governmental Affairs**  
**Subcommittee on Federal Spending Oversight and Emergency Management**

June 6, 2018

Chairman Paul, Ranking Member Peters, and members of the Subcommittee, on behalf of the American Civil Liberties Union, I would like to express our appreciation for the Subcommittee holding this hearing on “War Powers and the Effect of Unauthorized Military Engagements on Federal Spending.” No decision by government is graver or more consequential than the decision to go to war. Over the course of the nearly seventeen years since Congress passed the Authorization for Use of Military Force (AUMF) of 2001, the ACLU has dedicated considerable resources to defending civil liberties and human rights that have been jeopardized in an ongoing and increasingly global use of military force predicated on often, at best, tenuous claims of the 2001 AUMF as legal authority. It is long past time for Congress to step in and assert its will as the branch of government with the exclusive constitutional authority to declare war.

In the nearly half century since the ACLU urged the end of the United States role in the war in Southeast Asia after, at that time, more than a decade of violations of civil liberties and human rights, the ACLU has not take a position on whether military force should be used against or in any specific country, or against any specific force. However, we have been steadfast in insisting during those five decades, from Vietnam through Afghanistan through both wars in Iraq and up to conflicts in countries such as Libya, Yemen, and Syria, that decisions on whether to use military force require Congress’s specific, advance authorization.

Absent a sudden attack on the United States that requires the President to take immediate action to repel the attack, the President does not have the power under the Constitution to decide unilaterally to take the United States into war. Such power belongs solely to the Congress. We have repeatedly urged Congress not to cede its constitutional authority on the question of war authorization.

Congress’s power over decisions involving the use of military force derives from the Constitution. Article I, Section 8 provides that only the Congress has the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,” among other war powers.

As Thomas Jefferson once wrote, this allocation of war power to Congress provides an “effectual check to the Dog of war” by “transferring the power of letting him loose from the Executive to the Legislative body . . . .” Letter from Jefferson to Madison (Sept. 6, 1789). Congress alone has the authority to say yes or no on whether the President can use military force against another nation or against any group.

The structure of the Constitution reflects the framers’ mistrust of concentrations of power and their consequent separation of those powers into the three branches of our government. The framers well understood the danger of combining powers into the hands of a single person, even one who is elected, particularly a person given command of the armed forces. In order to prevent such an accumulation of power in times of war or emergency, the framers split the war powers between the Executive and Legislative branches, giving the Congress the power to declare war, i.e., make the decision whether

to initiate hostilities, while putting the armed forces under the command of the president.

After nearly seventeen years of war, the now burgeoning plans for even more military strikes and more military troops in even more countries and against even more groups exacerbates the longstanding problem of an Executive Branch that has invoked the 2001 AUMF, while usurping the authority of Congress. An AUMF drafted and passed by Congress to squarely focus on those who planned and carried out the 9/11 attacks and those who harbored them has been invoked 37 times for conflicts occurring in 14 countries, according to a 2016 Congressional Research Service report. The 2001 AUMF is the claimed authority for the use of force even against groups that did not exist on 9/11 and are at odds with core al Qaeda.

President Trump has now joined his two immediate predecessors in substituting the judgment of the president alone for the judgment of a Congress charged by the Constitution with the sole authority to decide whether, where, and against whom to go to war. While the most frequent claim of authority for the use of military force is the 2001 AUMF, Presidents Bush, Obama, and Trump have either added claims of Article II authority in certain military actions also predicated on the 2001 AUMF, or have taken significant military action based on Article II claims alone. Among the most significant of those claims based on Article II authority alone have been the 2011 United States air campaign against the Qadafi regime in Libya, and the 2018 United States air strikes against Syrian targets in response to Syrian use of chemical weapons.

The unauthorized use of military force has imposed terrible costs on America and the world. Beyond the obvious and tragic costs of war in American lives and treasure, the country has a long and painful history of civil liberties and human rights being jeopardized during war. Over these past nearly seventeen years, claims of war authority have been cited as legal justification for wrongs ranging from the drone killing of persons far from any battlefield, including American citizens, to the broad surveillance of phone calls and emails of Americans, to secret prisons where suspects were subjected to torture, and to indefinite detention without charge or trial, even of an American citizen apprehended in the United States. We strongly urge Congress to reflect back on lessons from the past nearly seventeen years—and consider all of the implications of going to war, including effects on civil liberties and human rights—in deciding next steps in deciding the scope of war authority, if any.

While it would be impossible in one Congress to undo the damage of nearly seventeen years of presidential overreach and congressional negligence or complicity on war authority, the ACLU strongly urges you to take the following three steps to help restore constitutional separation of powers and the rule of law:

**STEP ONE: Oppose S.J. Res. 59, the Corker-Kaine Proposed AUMF**

Applying to Congress a first principle of medical care—first do no harm—the top priority for this Congress must be to ensure that S.J. Res. 59, the proposed “Authorization for Use

of Military Force of 2018,” introduced this year by Senators Bob Corker and Timothy Kaine, does not become law. The ACLU recognizes the leadership of Chairman Paul in opposing the Corker-Kaine AUMF, and strongly urges all other senators to oppose it.

It would be hard to overstate the depth and breadth of the dangers to the Constitution, civil liberties, and human rights that the Corker-Kaine AUMF would cause. Not only would it almost irretrievably cede to the Executive Branch the most fundamental power that Congress has under Article I of the Constitution—the power to declare war—but it also would give the current president and all future presidents authority from Congress to engage in worldwide war, sending American troops to countries where we are not now at war and against groups that the President alone decides are enemies.

In their baffling explanation of their intent in introducing their proposed AUMF, Senators Corker and Kaine claim that it does the exact opposite of what it actually does. Both senators justifiably lament that our three most recent presidents have cited the 2001 and 2002 AUMFs as authority for the use of force in places, and against persons, far removed from the purpose and language of those AUMFs. But the proposed Corker-Kaine AUMF, rather than repealing or paring back the current AUMFs, is far broader and more dangerous than current law. To correct Executive Branch overreach, it oddly would provide the president with far more authority than the president currently has—and more than the Constitution allows.

The Corker-Kaine AUMF would authorize force, without operational limitations, against eight groups in six countries---and then allow the Executive Branch authority to add to both lists, as long as the president reports the expansion to Congress. The president would have unilateral authority to add additional countries—including the United States itself—to the list of countries where Congress is authorizing war, as well as additional enemies, including groups that do not even exist on the date of enactment. In a strange provision, the legislation provides that the president can also designate a “person” as an associated force, thereby expanding the AUMF to authorize military force against a presidentially designated “person,” again without prior authorization from Congress.

The American military could be sent into battle in countries such as Libya, Somalia, or Yemen to fight groups that most Americans have never even heard of. Worse, countries and groups that Congress has not found warrant American troops fighting could be added to the list without specific congressional authorization. The result could be the immediate deployment of tens of thousands, or even hundreds of thousands, of American military service members to fight if Congress passes and the president signs the Corker-Kaine AUMF.

Although Congress could bar an expansion to additional countries or additional groups, such action would effectively require a two-thirds majority of both houses, given that the president presumably would veto legislation to curtail an expansion that the president ordered. This aspect of the legislation would upend, in perpetuity, the Constitution’s specific process for the United States to go to war. Article I of the Constitution provides that Congress can authorize war with a majority vote and the signature of the president.



By contrast, the Corker-Kaine AUMF would authorize the resident to go to war with the stroke of a pen, and Congress would effectively need two-thirds of both houses to stop the president from unilaterally starting a new war.

The Corker-Kaine AUMF would have no operational restrictions and no definitive sunset. President Trump---and his successors for the coming decades---would effectively be able to claim for the Executive Branch the power that the Constitution gave to Congress exclusively, and do so with no limitations on how, where, when, why, or against whom war is carried out.

The Corker-Kaine AUMF would cause colossal harm to the Constitution's checks and balances, would jeopardize civil liberties and human rights at home and abroad, would lead to a breathtakingly broad expansion of war without meaningful oversight, and would represent a sharp break from adherence to international law, including the United Nations Charter. If enacted, a Corker-Kaine AUMF could cause fundamental damage to the Constitution, civil liberties, and human rights for a generation or longer.

A sleeper provision, with the innocuous title, "Sec. 10 Conforming Amendment," greatly expands the scope of the National Defense Authorization Act for Fiscal Year 2012 (NDAA) indefinite detention provision. In its single sentence, Section 10 of the Corker-Kaine AUMF would expand the NDAA indefinite detention authority by adding the new AUMF as a basis for the military to capture and imprison, under some circumstances indefinite detention without charge or trial.

The Corker-Kaine AUMF, like the NDAA detention provision itself, has no statutory prohibition in the AUMF against locking up American citizens or anyone picked up even in the United States itself. While we continue to believe it would still be unlawful for a president to try indefinite detention of an American citizen in the United States (again), there is no reason for Congress to risk it.

When Congress considered the NDAA detention provision in 2011, hundreds of thousands of activists from the ACLU joined allies from across the political and ideological spectrum in calling and meeting with members of Congress to urge its defeat. It narrowly passed, and President Obama signed it — with a promise not to use it against American citizens, but without denying that a president could have the power to order military detention. The Corker-Kaine AUMF would make the NDAA detention provision an even greater threat to civil liberties and human rights.

While we share the frustration of many senators with expansive presidential claims of war authority based on the 2001 AUMF and the 2002 AUMF, the proposed Corker-Kaine AUMF would cause far greater problems, and unless the courts would invalidate it as unconstitutional, it would be exceedingly difficult to curtail its damage. The ACLU strongly urges all senators to oppose the legislation.

**STEP TWO: Invalidate the Unlawful Claims of Article II Authority to Engage the American Military in Conflict Without Advance Congressional Authorization**

Beyond the expansive claims of authority under the existing 2001 AUMF, the Executive Branch claim of inherent Article II authority to use military force may prove to be even more corrosive to the Constitution, and an even greater threat to civil liberties and human rights. The Executive Branch, dating back almost back to the immediate aftermath of 9/11, has asserted claims of inherent authority under Article II of the Constitution, for the president, as commander in chief, to use military force. While this claim of authority was often in addition to statutory claims of authority, including under the 2001 or 2002 AUMFs, it also sometimes has stood alone. In perhaps the two most significant military actions taken outside any claim of authority under the existing AUMFs—the air campaign against the Qaddafi regime in Libya in 2011, and the air attacks on Syrian targets after Syrian chemical attacks in 2018—the Obama and Trump administrations, respectively, publicly released legal analyses with breathtakingly broad claims of Article II authority to use military force without congressional authorization. Congress must use its own authority to invalidate these claims.

Shortly after President Obama ordered the start of military action in Libya in 2011, the Office of Legal Counsel of the Department of Justice (OLC) wrote a memorandum, dated April 1, 2011, advising that the President had the constitutional authority to use military force in Libya, even in the absence of any congressional authorization. The principal argument in the OLC memo is that Congress’s Article I authority to declare war must be reviewed with the “historical gloss” of what OLC claims is a series of presidentially-ordered military actions that were neither authorized nor stopped by Congress. Remarkably, the April 2011 OLC memo claims that up to 20,000 ground soldiers can be put potentially in harm’s way, or an extensive air-based bombing campaign can be run, without congressional authorization, and in the absence of any imminent threat.

Last week, an OLC memorandum, dated May 31, 2018, goes even further than the OLC Libya opinion, in asserting broad Article II authority to use military force. The new OLC opinion explains President Trump’s authority for the air strikes he ordered against Syrian targets in response to Syrian use of chemical weapons. The OLC Syria opinion relies in large part on the OLC Libya opinion, but makes even broader claims of inherent constitutional authority, with even more tenuous explanations of the United States’ interest and a cramped definition of “war.” When read together, the OLC Libya and Syria opinions raise the question of whether the Executive Branch recognizes any legal requirement for a president ever to obtain advance congressional authorization for the use of military force.

While Congress should ultimately use legislation to invalidate these legal opinions and prohibit Executive Branch reliance on the opinions or their reasoning, this Subcommittee and other oversight committees should most immediately exercise oversight over departments and officials requesting, producing, and relying on these legal opinions. An underlying theme in these OLC opinions is congressional inaction has resulted in a loss of Congress’ constitutional authority. It is up to Congress to prove this argument wrong by taking action, beginning with oversight and ending with enacting legislation to invalidate the opinions and prohibit reliance on them.

**STEP THREE: Repeal 2001 and 2002 AUMFs; Ensure that Any New AUMF Specifically Identifies the Enemy, the Scope of the Conflict, and Clear Objectives—and Is Actually Needed for the Defense of the United States; Defund Any Use of Military Force Not Specifically Authorized by Congress**

After seeing the never ending expansion of the use of military force under the 2001 AUMF, from a focused initial operation in Afghanistan to a broad campaign through multiple continents and against groups whose names are not even given to most members of Congress, it is clear that Congress should not expect any president to limit himself or herself in claiming 2001 AUMF authority for new military engagements. Congress ultimately will have to repeal the 2001 and 2002 AUMFs, decide whether to enact any new specific AUMF if warranted, and defund any use of military force not specifically authorized by Congress.

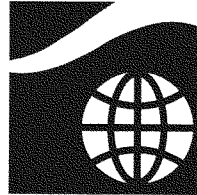
The 2001 and 2002 AUMFs have long outlived their purposes. The United States has now been at war longer than in any other period in American history. The objectives of both AUMFs were accomplished long ago, as those who planned and carried out the 9/11 attacks were killed or captured years ago, and Saddam Hussein and his regime are long gone. The AUMFs that authorized those objectives have been repurposed to fighting enemies unknown to the American people and even most of Congress, in countries most Americans could not point out on a map, and to achieve an objective that seems to have little or nothing to do with how most Americans would define national defense. Congress should repeal both AUMFs.

If Congress decides that there is a need to send the military to war, we strongly urge that any declaration of war specify the countries or organizations against whom the use of force is authorized, the scope of the conflict, and clear objectives for the use of force. Only with such specificity can Congress fulfill its constitutional role as a check on the Executive Branch. Specificity helps ensure that all Americans can understand the consequences of any war decision and participate in the debate over that decision. Congress can assert its role as a check on the president, by providing a standard against which to measure the progress of a war, and hold the president accountable for his actions. Specifying clear objectives for the use of force is important because, once the clear objectives are met, the authorization will no longer have effect.

Senator Merkley has introduced a sharply focused Authorization for Use of Military Force against al Qaeda and the Taliban in Afghanistan and against ISIS in Iraq. The hallmark of a war authorization that is consistent with the Constitution is specificity in defining why and where the United States will go to war, and against whom. The Merkley AUMF meets this standard. To be clear, the ACLU does not take a position on whether military force should be used against the groups or in the countries listed in the Merkley AUMF, but in contrast to the Corker-Kaine AUMF, Senator Merkley has introduced an AUMF that reflects a deep awareness of both the framework of the Constitution and the gravity of the decision to go to war.

Historically, the most certain route to Congress claiming its constitutional authority and asserting its will is to use its power of the purse. Eliminating funds for unauthorized military engagements, and prohibiting any rebudgeting of existing funds, cuts off the activity. If done consistently, defunding should dissuade a president from taking similar action, and helps restore the role of Congress in deciding whether to take the country to war. Congress should use the power of the purse to defund unauthorized military engagements.

Again, the ACLU greatly appreciates the opportunity to present this testimony, commends the Subcommittee for holding the hearing, and we are grateful for the leadership of Chairman Paul on these important constitutional questions. We look forward to working with you and other members of Congress and staff in Congress reclaiming its exclusive constitutional authority to decide whether to use military force.



**Committee For  
Responsible  
Foreign Policy**

**Statement for the Record by the Committee for Responsible Foreign Policy**

**Senate Homeland Security and Governmental Affairs Subcommittee on Federal Spending Oversight and Emergency Management hearing:**

**War Powers and the Effects of Unauthorized Military Engagements on Federal Spending**

**June 6, 2018**

**2:30 P.M. SD-342, Dirksen Senate Office Building**

Chairman Paul and Ranking Member Peters:

We believe hearings are useful ONLY if there are actionable items Members of Congress and citizens follow through on to ensure Congress reasserts its Constitutional Article I, Section 8 powers over ALL Presidents to declare war.

We recommend the following:

- 1) Reduce to \$1 the salary of Steven A. Engel, Assistant Attorney General, Office of Legal Counsel (OLC).

In a May 31, 2018, memorandum, Mr. Engel writes, "The President could lawfully direct airstrikes on facilities associated with Syria's chemical weapons capability because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense."

Mr. Engel's failure to understand the Constitution and the explicit directions set by our Founding Fathers to keep the power of war making in the hands of the legislative body is grounds for this action.

- 2) Members of the House and Senate should compel the UNREDACTED release to the Subcommittee all documents and all forms of communications the Office of OLC relied

upon to write this decision. Reduce the salaries to \$1 for any executive official obstructing document production.

- 3) Engaged citizens should immediately begin to FOIA documents from the OLC and contact their elected Representatives and Senators if they are being stonewalled.
- 4) A solo hearing on legislative standing for War Powers should be conducted by this subcommittee to ensure the U.S. taxpayers are only funding wars authorized by the Congress.
- 5) Change the culture of Congress. Seven decades of feckless and risk adverse lawmakers have destroyed Article I, Section 8 of the Constitution. Citizens of all parties and ideologies should demand that if our nation's sacred blood and treasure be spilled on an overseas battlefield, it must be authorized by Congress. Party in power of the White House and Congress does not make a difference to a Gold Star family member.

We decided to let others recite the long and exhaustive history on Article I War Powers. It is our goal to enrage the U.S. citizenry to demand that their elected representatives do their job, not just send out fluff press releases and television hits.

The hearing is a perfect example of Congress taking the steps to do the right thing. If our actions are not utilized, the hearing would only be deemed as a press stunt. That would be sad!

The Committee for Responsible Foreign Policy is a non-profit founded on the belief that the United States must pursue a realistic and restrained foreign policy. Foundational to responsible and thoughtful foreign policy is the need for congressional consent for all acts of war. Too often, Congress has taken a backseat in directing military actions, acquiescing to the President. The Constitution spells out in Article I, Section 8 that the authority to authorize war comes exclusively from Congress.

**Post-Hearing Questions for the Record  
Submitted to the Honorable Andrew Napolitano  
Senior Judicial Analyst  
Fox News Channel  
From Senator Gary C. Peters**

**“War Powers and the Effects of Unauthorized Military Engagements on Federal  
Spending”  
Wednesday, June 6, 2018**

- 1) The 2001 AUMF was passed in aftermath of September 11 attacks in order to hold the perpetrators of these attacks responsible. In the 17 years since its enactment, the 2001 AUMF has been invoked as the authority for military activities in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia against al Qaeda and “associated” or “affiliated forces.” The global terrorist threat is transitional and constantly evolving. We have a responsibility to safeguard the national security of the U.S., but we should also be thinking about ways to reevaluate our process for authorizing military action in a counterterrorism context.

**a) Does it make sense for the U.S. to treat counterterrorism activities as a form of warfare?**

Our Constitution divides the war powers between Congress and the executive; Article II names the president as commander-in-chief of the armed forces, while Article I vests in Congress, and Congress alone, the powers to declare war and to appropriate funds to the Department of Defense to wage it. Congress—as representatives of the American people—must pass legislation authorizing *all offensive* use of military force before the president unilaterally takes action. By categorizing the use of military force as a counterterrorism operation, we flout the protections inherent in the Constitution. Congress has the dominant role in the use of force decisions (even if such decisions are not deemed to be “declarations of war”) not only because the Constitution dictates such, but because having the involvement of the legislative branch can spur consideration of policy alternatives, raise important strategic considerations, and build the public support necessary for sustainable national security strategy; in effect, it strengthens our democracy and our legitimacy.

**b) Is there a fundamentally different framework or approach to counterterrorism that Congress should consider?**

No opinion.

**c) How can we assert Congress’s constitutional authority to authorize military force against transnational terrorist groups that are dispersed across wide swaths of territory and may quickly find safe haven in another country?**

No opinion.

**d) What kind of authorization should Congress consider specifically for counterterrorism efforts?**

No opinion.

**e) What are the guiding principles that should be taken into account when providing a framework for countering the global terrorist threat?**

The framers of our Constitution did not intend for the president to have unchecked powers to wage war. Instead, they gave the power to declare war exclusively to Congress, because Congress most directly represents the American people, especially those citizens who volunteer to serve in our military and put themselves in harm's way. James Madison once wrote, "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than any other, it is that which separates the legislative, executive, and judicial powers." Despite this founding father's call to adhere to the separation of powers, presidents have accumulated power at the expense of Congress as part of a pattern in which the executive branch eclipses the legislature. In order to maintain the proper balance of powers, the following two principles should be taken into account.

First, we must maintain Congress's constitutional role in authorizing war. The framers of the Constitution clearly vested the power to authorize war in the Congress. Any new AUMF must require Congress—the direct representatives of the American people—to authorize new military action rather than delegating this power to the President. Members of Congress are uniquely positioned to scrutinize military operations and the strategy underlying them, identify any flaws and failures in policy, and inject innovative or disruptive new ideas into the public debate that will make success more likely. Additionally, they have the ability to travel to places like the Middle East, meet with military commanders and frontline forces, and engage officials, scholars, reporters, and visiting foreign leaders in Washington.

Second, we must provide transparency to the American people. The executive branch must be transparent by providing critical information to Congress and the American people, such as outlining the objectives of our war on terrorist groups and the strategies for how they plan to address the threats; a report on the civilian casualties that result from U.S. military action; other information critical to understand the scope and impact of the conflict; and the financial costs to the U.S. taxpayers. The mission of Congress should be to provide smart, determined oversight—asking tough, well-informed questions, illuminating and demanding accountability for failures, and encouraging fresh thinking. To that end, members must be willing to invest the considerable time and effort to develop an expertise in national security, especially around the conflicts we are fighting. Congress is also unique in its authority to peer through the cloud of secrecy that otherwise necessarily cloaks much of the conduct of war.

**f) What limitations should such an authorization include?**

A declaration of war must specify the target and set forth a duration of the use of force.



- g) If an ally or partner country requests U.S. military assistance in combating terrorism, what power does the executive have to provide that assistance without explicit congressional authorization?**

The executive would only have power to provide assistance without explicit congressional authorization if a treaty to which the United States is a party provides for it.

- 2) Overseas Contingency Operations (OCO) funds were originally intended as a safety valve to account for the costs of active combat, like replacing equipment, resupplying munitions, and transporting troops. Since war is unpredictable, OCO funds are not subject to the spending caps imposed by Budget Control Act. But this opens up the possibility that items more suited for the Department of Defense's (DoD) base budget will be categorized as OCO in order to get around the spending caps. That's why some people see OCO as a "slush fund" with very little oversight and accountability. Last year, the Government Accountability Office recommended that DoD take action to reevaluate and revise the criteria for what should be included in DoD's OCO budget requests. This budget gimmick only makes it harder for DoD and Congress to plan for the future. Even so, the Trump Administration's most recent budget request for Fiscal Year 2019 includes almost \$70 billion for OCO with no end in sight.

- a) How does the reliance on OCO funding contribute to the executive branch's unauthorized use of military force?**

The Constitution gives Congress authority to limit a president's prerogatives through the power of the purse, but by creating this slushfund lawmakers seem to be giving that power to the Secretary of Defense and the president he serves. Any mechanism that permit the President to encroach upon Congress' unilateral powers to declare war and delegate funds is unconstitutional.

- b) Is OCO still an appropriate mechanism to fund our current military activities abroad against al Qaeda and ISIS?**

No.

- c) From a budgeting and appropriations standpoint, what steps do you recommend that Congress take to reassert control over spending on military forces?**

No opinion.

- 3) In a hearing earlier this year, this subcommittee explored the issue of crisis budgeting. Congress's consistent failure to follow regular order during the budgeting and appropriations process means that we end up passing omnibus appropriations bills hundreds of pages long with barely any time to understand what's in the bill. These omnibus bills include billions of dollars of funding for our military activities abroad, including OCO funding. In effect, members of Congress are failing to assert their responsibility to oversee this spending.

- a) **What effect does this failure to follow regular order in Congress have on our military spending?**

No opinion.

- b) **What role has this played in the paralysis of congressional debate on passing a new AUMF?**

No opinion.

- c) **What proposals targeting “unauthorized” appropriations do you suggest to control federal spending on military activities abroad?**

No opinion.

- 4) Since 2015, the U.S. has provided support for Saudi Arabia’s war through intelligence sharing and air-to-air refueling assistance. This war has also resulted in 15,000 civilian casualties and a humanitarian disaster. The U.S. provides this assistance to Saudi Arabia and separately to the United Arab Emirates for their activities in Yemen through what are known as “acquisition and cross-servicing agreements.” Under the law, DoD must provide notifications to Congress before entering into one of these agreements. Earlier this year, I joined several of my colleagues in sending a letter to Secretary Mattis asking why it appeared that DoD had not properly notified Congress before signing agreements with Saudi Arabia and the UAE to support the war in Yemen. DoD’s response indicated that DoD had notified Congress of Saudi Arabia’s eligibility to enter into these agreements in 1998 and the UAE in 1992. Apparently DoD’s reading of the law allows the U.S. to provide military support to these countries in perpetuity after notifying Congress once over 20 years ago.

- a) **What is the proper role of Congress in overseeing the expenditure of U.S. taxpayer dollars in support of other countries’ uses of military force?**

The role of Congress and the powers conferred to it by the Constitution do not change because the executive branch seeks to use funds in support of another country’s military. The Constitution is clear that the power of the purse remains with the legislative branch.

- b) **Should this kind of military assistance, like refueling assistance, fall under the scope of activities that need explicit congressional authorization?**

Yes. Article I gives Congress the power not only to declare war, but also to “provide for the common defense,” “raise and support armies,” “provide and maintain a navy,” “make rules for the government and regulation of the land and naval forces,” and “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

- c) **Does our military support for the Saudi war in Yemen implicate the War Powers Resolution?**

The War Powers Resolution is unconstitutional.

**Post-Hearing Answers for the Record  
Submitted By Jonathan Turley  
Shapiro Chair of Public Interest Law  
George Washington University**

**Questions From Senator Gary C. Peters**

**“War Powers and the Effects of Unauthorized Military Engagements on Federal Spending”  
Wednesday, June 6, 2018**

1. The 2001 Authorization for Use of Military Force (AUMF) was passed in the immediate aftermath of the September 11 attacks in order to hold the perpetrators of these attacks responsible. In the 17 years since its enactment, the 2001 AUMF has been invoked as the authority for military activities in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia against al Qaeda and “associated” or “affiliated forces.” The global terrorist threat is transnational and constantly evolving. We have a responsibility to safeguard the national security of the U.S., but we should also be thinking about ways to reevaluate our process for authorizing military action in a counterterrorism context. **Does it make sense for the U.S. to treat counterterrorism activities as a form of warfare? Is there a fundamentally different framework or approach to counterterrorism that Congress should consider? How can we assert Congress’s constitutional authority to authorize military force against transnational terrorist groups that are dispersed across wide swaths of territory and may quickly find safe haven in another country? What kind of authorization should Congress consider specifically for counterterrorism efforts? What are the guiding principles that should be taken into account when providing a framework for countering the global terrorist threat? What limitations should such an authorization include? If an ally or partner country requests U.S. military assistance in combatting terrorism, what power does the executive have to provide that assistance without explicit congressional authorization?**

**RESPONSE FROM PROFESSOR TURLEY:**

Both United States and international law recognize the right for a country to act in self-defense, including concepts of preemptive and preventive action. However, the range of unilateral attacks carried out on foreign soil is difficult to justify on either U.S. or international law. As a matter of constitutional law, presidents now routinely carry out prolonged operations on foreign soil that would clearly constitute an act of war under commonly used definitions. Yet, as discussed in my testimony, this is being done entirely without an express declaration of war. Some counterterrorism operations in recent years are clearly a form of warfare under the Constitution. These are not simply single drone attacks but continuing and prolonged operations in different countries. Many have had fixed assets in the countries and both air and ground components.

The United States also asserts the right to carry out these operations as matters of preemptive or prevention action. Putting aside the constitutional issue of declaring war, international law does permit an attack on another country for harboring terrorists, as was the case in Afghanistan. Moreover, in a “failed state” with no cognizable government, the sovereignty issues are obviously

less defined and limiting. However, most of our attacks have occurred in areas that are not part of “failed states.” Countries like Pakistan have insisted that they have not approved of such incursions. Unless there is an imminent attack on the United States to be launched from such areas, the invasion or incursion into another country runs against a host of international principles and cases. Prior administrations, including the Bush and Obama administrations, have argued that the United States can still attack the territory of a country with no “link of attribution” to a terrorist organization as a matter of preventive self-defense.

The United States could ultimately fall victim to the law that it is creating. Indeed, we are returning to a state of nature where countries claim the right to attack anywhere and anytime based on their view of self-defense. The same interpretation could be used by Mexico or Turkey in taking out individuals or targets in the United States. In the absence of true hot pursuit or the active harboring of terrorists, the United States must reinforce sovereignty principles in using greater restraint. That is not likely to happen without clear and binding action from Congress.

Under the U.N. Charter Art. 2(4), the use of force by one state against another state is barred except for the use force authorized by the United Nations Security Council under Chapter VII or cases of self-defense under Article 51. The current interpretation of the United States would allow the self-defense exception to swallow the rule. Any country could attack the territory of another to fight against hostile non-state or state actors. It will become increasingly dangerous and unsustainable to claim the right to continually and unilaterally attack targets throughout the world based on a claim of fighting terrorism. This trend not only allow our government to evade its obligations to openly declare wars but it allows other governments to evade their own responsibility in failing to act against (or secretly encouraging) terror organizations. A new and more limited interpretation will force the United States to be more clear both with Congress and with foreign countries. If the United States cannot simply attack any targets in any country, it will have to demand access or permission from such countries. For example, if Pakistan is not going to take action against terrorists while barring U.S. action, it publicly confirms its true position with regard to the United States and moves closer to the definition of harboring terror groups. Not only should that result in the denial of U.S. aid, but it would put Pakistan in a publicly hostile position vis-à-vis the United States. In other words, greater adherence of international rules can bring greater clarity in our current international relations. The Framers wanted war operations to be matters of public deliberation and public declaration. The current system has succeeded in allowing global war operations without the knowledge of most members of Congress, let alone citizens.

2. Overseas Contingency Operations (OCO) funds were originally intended as a safety valve to account for the costs of active combat, like replacing equipment, resupplying munitions, and transporting troops. Since war is unpredictable, OCO funds are not subject to the spending caps imposed by the Budget Control Act. But this opens up the possibility that items more suited for the Department of Defense’s (DOD) base budget will be categorized as OCO in order to get around the spending caps. That’s why some in the public see OCO as a “slush fund” with very little oversight and accountability. Last year, the Government Accountability Office recommended that DOD take action to reevaluate and revise the criteria for what should be included in DOD’s OCO budget requests. This budget gimmick only makes it harder for DOD and Congress to plan for the future. Even so, the Trump Administration’s most recent budget request for Fiscal Year 2019 includes

almost \$70 billion for OCO with no end in sight. **How does the reliance on OCO funding contribute to the executive branch's unauthorized use of military force? Is OCO still an appropriate mechanism to fund our current military activities abroad against al Qaeda and ISIS? From a budgeting and appropriations standpoint, what steps do you recommend that Congress take to reassert control over spending on military force?**

**RESPONSE FROM PROFESSOR TURLEY:**

As I have stated in prior testimony, including my recent testimony before this Committee, the modern budgeting system has effectively negated the single most defining power under Article I: the power of the purse. The Executive Branch is practically no longer dependent on Congress to launch and prosecute major wars for prolonged periods. By definition, a "contingency operation" is any "military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are, or may become, involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." That is not a limitation as much as a blanket authorization. This act of designating a contingency operation then opens up a shockingly vague and open-ended budgetary option for the Executive Branch. While Article I, Section 9 states that Congress alone appropriates money to be taken from the Treasury, it has become a willing partner to its own institutional obsolescence. At one time, such operations would need a supplemental appropriation. Thus, for costs above the baseline of "continuing annual costs of DoD operations funded by the Component's base appropriations," a new contingency funding was needed. However, the Pentagon has long played fast and loose with the designations of baseline and contingency costs – shifting too freely between the categories to fund operations within the DoD Financial Management Regulation (FMR). Under the John Warner National Defense Authorization Act for Fiscal Year 2007, Congress moved the costs for Iraq and Afghanistan under the annual budgetary system. However, Congress approved OCO incremental funding that continued to allow a steady stream of money to conduct unilateral military operations, including incursions in foreign countries. The General Accounting Office has criticized the continued abuse of OCO funding. Congress has preferred to remain willfully blind in funding of these operations despite the high risk of the operations triggering broader military conflicts and international tensions. The Office of Management and Budget has put forward a memorandum that offers little real limitations by allowing OCO funds for operations in "[g]eographic areas in which combat or direct combat support operations occur" including "Iraq, Afghanistan, Pakistan, Kazakhstan, Tajikistan, Kyrgyzstan, the Horn of Africa, Persian Gulf and Gulf nations, Arabian Sea, the Indian Ocean, the Philippines, and other countries on a case-by-case basis."

All of this history shows little more than a budgetary Potemkin Village with only the pretense of legislative review and deliberation. Congress needs to exercise greater control through its sole constitutional right to declare war as well as its power of the purse to exercise greater control over the initiations and maintenance of war operations. This means limiting funds to baseline operations or clearly specified operations. That includes more rigid definitions of baseline and incremental costs that limit how particular equipment and other expenditures are accounted for under our budget.

3. In a hearing earlier this year, this subcommittee explored the issue of crisis budgeting. Congress's consistent failure to follow regular order during the budgeting and appropriations process means that we end up passing omnibus appropriations bills hundreds of pages long with barely any time to understand what's in the bill. These omnibus bills include billions of dollars in funding for our military activities abroad, including OCO funding. In effect, members of Congress are failing to assert their responsibility to oversee this spending. **What effect does this failure to follow regular order in Congress have on our military spending? What role has this played in the paralysis of congressional debate on passing a new AUMF? What proposals targeting "unauthorized" appropriations do you suggest to control federal spending on military activities abroad?**

**RESPONSE FROM PROFESSOR TURLEY:**

Congress now routinely passes budgets and legislation that is reviewed, at best, in summary form. From the Patriot Act to OCO omnibus authorizations, members engage in the pretense of legislative review in being given massive bills shortly before votes on the floor. The practice violates the core of Article I in establishing Congress as a check upon executive power. The refusal to follow regular order continues to be a premeditated act of self-removal by this institution from the system of checks and balances in our tripartite system of government. The lack of scrutiny and debate makes Congress little more than a technicality in the governance of the nation.

4. Since 2015, the U.S. has provided support for Saudi Arabia's war through intelligence sharing and air-to-air refueling assistance. This war has also resulted in 15,000 civilian casualties and a humanitarian disaster. The U.S. provides this assistance to Saudi Arabia and separately to the United Arab Emirates for their activities in Yemen through what are known as "acquisition and cross-servicing agreements." Under the law, DOD must provide notifications to Congress before entering into one of these agreements. Earlier this year, I joined several of my colleagues in sending a letter to Secretary Mattis asking why it appeared that DOD had not properly notified Congress before signing agreements with Saudi Arabia and the UAE to support the war in Yemen. DOD's response indicated that DOD had notified Congress of Saudi Arabia's eligibility to enter into these agreements in 1998 and the UAE in 1992. Apparently DOD's reading of the law allows the U.S. to provide military support to these countries in perpetuity after notifying Congress once over 20 years ago. **What is the proper role of Congress in overseeing the expenditure of U.S. taxpayer dollars in support of other countries' uses of military force? Should this kind of military assistance, like refueling assistance, fall under the scope of activities that need explicit congressional authorization? Does our military support for the Saudi war in Yemen implicate the War Powers Resolution?**

**RESPONSE FROM PROFESSOR TURLEY:**

As with the use of the rendition program to support the torture of detainees, military assistance funding should not be able to achieve indirectly what is barred directly for the Executive Branch. Historically, various countries, including the United States, have used surrogates to fight in wars around the country. This was most common during the "Cold War" between the United States and the Soviet Union. Congress has every right to conduct oversight in the use of U.S. military funds to

commit war crimes or to circumvent U.S. laws. It can bar aid to certain countries or bar certain types of aid as part of its authorization and appropriation process.

Congress has the power to stipulate conditions on such spending and to require reporting on the use of the funds. It has largely ignored that power along with its obligation to make fully informed and deliberative decisions on both appropriations and legislation.



**Post-Hearing Questions for the Record**  
**Submitted to Christopher Anders**  
**Deputy Director, Washington Legislative Office**  
**American Civil Liberties Union**  
**From Senator Gary C. Peters**

**“War Powers and the Effects of Unauthorized Military Engagements on Federal Spending”**  
**Wednesday, June 6, 2018**

1. The 2001 Authorization for Use of Military Force (AUMF) was passed in the immediate aftermath of the September 11 attacks in order to hold the perpetrators of these attacks responsible. In the 17 years since its enactment, the 2001 AUMF has been invoked as the authority for military activities in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia against al Qaeda and “associated” or “affiliated forces.” The global terrorist threat is transnational and constantly evolving. We have a responsibility to safeguard the national security of the U.S., but we should also be thinking about ways to reevaluate our process for authorizing military action in a counterterrorism context. **Does it make sense for the U.S. to treat counterterrorism activities as a form of warfare? Is there a fundamentally different framework or approach to counterterrorism that Congress should consider? How can we assert Congress’s constitutional authority to authorize military force against transnational terrorist groups that are dispersed across wide swaths of territory and may quickly find safe haven in another country? What kind of authorization should Congress consider specifically for counterterrorism efforts? What are the guiding principles that should be taken into account when providing a framework for countering the global terrorist threat? What limitations should such an authorization include? If an ally or partner country requests U.S. military assistance in combatting terrorism, what power does the executive have to provide that assistance without explicit congressional authorization?**

ANSWER: The United States has long relied on overly broad claims of AUMF authority to engage in often-secret military or paramilitary actions in an unknown number of countries against enemies the executive branch has refused to identify publicly, and to hold detainees indefinitely and without charge or trial. For their part, Congress and the courts have largely deferred to the executive’s claims of war-based authority, weakening the other two branches’ ability to check rights violations committed by the executive. The result has been a perpetual, unchecked war, which is now expanding even further.

The unrelenting drumbeat by some of our political leaders to force the nation into a military response to any act or even threat of terrorism anywhere in the world. That drumbeat draws no distinction between combatants in Kandahar—against whom a military response at times was lawful and necessary—and suspected terrorists in Kentucky—against whom it is neither. It is a drumbeat that ignores our strengths and promotes our failures; it rejects the constitutional system of checks and balances, fundamental due process, and compliance with both domestic and international law. It is a drumbeat that falsely posits terrorism as an existential threat that

requires us to reject our fundamental values of due process, fairness, and justice, in favor of unlawful and rampant killing, indefinite military detention, and unfair military trials.

Over the past 17 years, America has become an international legal outlier in invoking the right to use lethal force and indefinite detention against suspected terrorists outside battle zones. If we further entrench the militarization of our counter-terrorism efforts, our nation risks becoming a legal pariah, to the detriment of those efforts.

But the dangers of a war-based approach to terrorism extend beyond specific policies. In the name of national security, our leaders are undermining our more enduring security: the international legal framework that the United States helped to establish and that protects our long-term interests. Political leaders who insist that the laws of war permit our executive to treat as a battlefield any location where a terrorism suspect is located are giving a green light to other nations—including those with less respect for international legal institutions—to do the same. No nation has a stronger interest than we do in the existence of clear rules on when nations are engaged in war, and who can be killed or detained in that war. If the rules we apply are not clear, we compromise our ability to hold other countries to account for grave violations.

We have always believed ourselves to be a nation that turns to war only out of necessity, in conflicts that can be defined, and against enemies that can be identified. For Congress and the executive to commit us to an everywhere and forever war against all suspected terrorists everywhere turns those beliefs on their head. It also undermines values that define us in our own eyes and in the eyes of the world, and it sends the dangerous message that we are willing to give terrorists what they seek—the status of military warriors, not common criminals. Such a global war approach to counter-terrorism does not make us safer. It is not too late to chart a different course, but we, and our political leaders, need to show the courage, and the will, to do so.

2. Overseas Contingency Operations (OCO) funds were originally intended as a safety valve to account for the costs of active combat, like replacing equipment, resupplying munitions, and transporting troops. Since war is unpredictable, OCO funds are not subject to the spending caps imposed by the Budget Control Act. But this opens up the possibility that items more suited for the Department of Defense's (DOD) base budget will be categorized as OCO in order to get around the spending caps. That's why some in the public see OCO as a "slush fund" with very little oversight and accountability. Last year, the Government Accountability Office recommended that DOD take action to reevaluate and revise the criteria for what should be included in DOD's OCO budget requests. This budget gimmick only makes it harder for DOD and Congress to plan for the future. Even so, the Trump Administration's most recent budget request for Fiscal Year 2019 includes almost \$70 billion for OCO with no end in sight. **How does the reliance on OCO funding contribute to the executive branch's unauthorized use of military force? Is OCO still an appropriate mechanism to fund our current military activities abroad against al Qaeda and ISIS? From a budgeting and appropriations standpoint, what steps do you recommend that Congress take to reassert control over spending on military force?**

ANSWER: In order for Congress to reassert its constitutional authority to decide unilaterally the questions of whether, where, and against what enemy the United States will engage its armed forces, Congress must use its authority under the Spending Clause to defund unauthorized actions.

Across three administrations over the past 17 years, presidents have claimed authority, erroneously under the 2001 AUMF or often unlawfully under Article II, to engage the military in the use of lethal force far from recognized battlefields and in circumstances far outside the scope of the 2001 AUMF. While the political pressure that may come from additional transparency through stepped-up congressional oversight can lead to a president reining in the use of military force unauthorized by Congress, the most certain way to end unauthorized use of force is through Congress explicitly barring the use of federal funds.

3. In a hearing earlier this year, this subcommittee explored the issue of crisis budgeting. Congress's consistent failure to follow regular order during the budgeting and appropriations process means that we end up passing omnibus appropriations bills hundreds of pages long with barely any time to understand what's in the bill. These omnibus bills include billions of dollars in funding for our military activities abroad, including OCO funding. In effect, members of Congress are failing to assert their responsibility to oversee this spending. **What effect does this failure to follow regular order in Congress have on our military spending? What role has this played in the paralysis of congressional debate on passing a new AUMF? What proposals targeting "unauthorized" appropriations do you suggest to control federal spending on military activities abroad?**

ANSWER: The chaotic budgeting and appropriations process, combined with a more orderly but largely secretive authorizing process for the Department of Defense and the intelligence community, has resulted in lost opportunities for members of Congress to push Congress to use its Spending Clause authority to reassert the role assigned to it by the Constitution to decide the most fundamental questions of going to war. On either a country by country basis or an activity by activity basis, Congress should work its way around the globe, explicitly defunding military action not authorized by Congress. The deaths of four American soldiers near Tongo Tongo, Niger last year is but one tragic example of the Executive Branch making its own unilateral decisions on the use of force, and Congress's failure to exercise oversight. Congress must use its spending powers to make clear that the president may not use military force in a country such as Niger, absent the need to "repel sudden attacks" (in the words of James Madison) on the United States, without advance congressional authorization. More orderly and regular budgeting, appropriations, and authorizing processes would allow additional opportunities for Congress to reassert its constitutional role.

4. Since 2015, the U.S. has provided support for Saudi Arabia's war through intelligence sharing and air-to-air refueling assistance. This war has also resulted in 15,000 civilian casualties and a humanitarian disaster. The U.S. provides this assistance to Saudi Arabia and separately to the United Arab Emirates for their activities in Yemen through what are known as "acquisition and cross-servicing agreements." Under the law, DOD must provide notifications to Congress before entering into one of these agreements. Earlier this year, I joined several of my colleagues in sending a letter to Secretary Mattis asking why it appeared that DOD had not properly notified Congress before signing agreements with Saudi Arabia and the UAE to support the war in Yemen. DOD's response indicated that DOD had notified Congress of Saudi Arabia's eligibility to enter into these agreements in 1998 and the UAE in 1992. Apparently DOD's reading of the law allows the U.S. to provide military support to these countries in perpetuity after notifying Congress once over

20 years ago. **What is the proper role of Congress in overseeing the expenditure of U.S. taxpayer dollars in support of other countries' uses of military force? Should this kind of military assistance, like refueling assistance, fall under the scope of activities that need explicit congressional authorization? Does our military support for the Saudi war in Yemen implicate the War Powers Resolution?**

ANSWER: Congress should pursue effective measures to end the unauthorized role of the United States in the fighting, which has resulted in horrific consequences in Yemen. We support legislation, including legislation introduced by Senator Tim Kaine, which would prohibit the funding of U.S. refueling of Saudi aircraft. We similarly will support Senate legislation to bar arms shipments and other defense assistance to the Kingdom of Saudi Arabia, as a way to stop the U.S. role in the Saudi-led fight in Yemen. There are multiple ways for Congress to assert its constitutional authority and force its will to stop use of force that was never authorized by Congress,

U.S. support for the Kingdom of Saudi Arabia against the Houthis is already a violation of the War Powers Resolution. The War Powers Resolution is self-executing. Under its provisions, the President must remove all U.S. forces from hostilities no later than 90 days after U.S. forces were entered into hostilities. By resolution, Congress can end authority and force withdrawal of forces earlier than 90 days—but once 90 days has passed, it is unlawful for the President to keep U.S. forces in hostilities. President Obama violated the War Powers Resolution, with respect for support for the Saudi-led coalition, more than two years ago, and President Trump has continued the unlawful support for the Saudis in Yemen. The violation occurred more than two years ago. The role of Congress now should be to enforce the War Powers Resolution by defunding U.S. support for the Saudi-led forces.